(26,551)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 473.

JOSEPH E. NADEAU, MARTHA NADEAU, HIS WIFE, ET AL., PLAINTIFFS IN ERROR,

vs.

UNION PACIFIC RAILROAD COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 13, 1918.

a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the First Division of the Judicial District of Kansas, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the January Term, 1918, thereof, between Union Pacific Railroad Company, Plaintiff and Joseph E. Nadeau, Martha Nadeau, his wife, et al., Defendants, a manifest error hath happened, to the great damage of said Defendants, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid, at the city of Washington, D. C., and filed in the office of the Clerk of the United States Supreme Court on or before the thirteenth day of May, 1918, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this thirteenth day of April, in the year of our Lord one thousand nine hundred and eighteen.

Issued at office in the City of Topeka, with the seal of the District Court of the United States for the First Division of the Judicial District of Kansas, dated as aforesaid.

[Seal of District Court U. S., District of Kansas, 1861.]

F. L. CAMPBELL,
Clerk District Court United States, First Division of the Judicial District of Kansas.

Allowed by
JOHN C. POLLOCK, *Judge.*

b *Return to Writ.*

UNITED STATES OF AMERICA,
First Division of the Judicial District of Kansas, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said District Court, at office in the City of Topeka, this 29th day of April, A. D. 19[illegible].

[Seal of District Court U. S., District of Kansas, 1861.]

F. L. CAMPBELL,
Clerk of said Court.

[Endorsed:] No. 1710. United States District Court, First Division of the Judicial District of Kansas. Joseph E. Nadeau, et al., vs. Union Pacific Railroad Co. Writ of Error to the District Court of the United States for the First Division of the Judicial District of Kansas. Filed 13th day of April, 1918. F. L. Campbell, Clerk.

c In the Supreme Court of the United States.

JOSEPH E. NADEAU, MARTHA NADEAU, His Wife; GEORGE HUNTSMAN, and James I. Anderson, Plaintiffs in Error,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

To the Union Pacific Railroad Company, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States District Court in and for the District of Kansas, wherein Joseph E. Nadeau, Martha Nadeau, his wife, George Huntsman and James I. Anderson, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John C. Pollock, Judge of the United States District Court in and for the State of Kansas, this 13 day of April, 1918.

JOHN C. POLLOCK,
Judge of the United States District Court in and for the District of Kansas.

1 I hereby waive service of citation herein and hereby enter appearance of Defendant in Error.

R. W. BLAIR,
Atty. for Dfdt. in Error.

2 [Endorsed:] No. 1710. In the Supreme Court of United States. Joseph E. Nadeau, et al., Plaintiffs in Error, versus

Union Pacific Railroad Co., Defendants in Error. Citation. Filed Apr. 15, 1918. F. L. Campbell, Clerk, by C. B. White, Dep. Clk. Z. T. Hazen and J. B. Larimer, and A. E. Crane, Lawyers, 226 New England Building, Topeka, Kansas, Attorneys for —.

3 In the District Court of the United States for the District of Kansas, First Division.

No. 1710.

UNION PACIFIC RAILROAD COMPANY, Plaintiff,

vs.

JOSEPH E. NEDEAU, MARTHA NEDEAU, His Wife; GEORGE HUNTSMAN, and JAMES I. ANDERSON, Defendants.

Petition.

Now comes Union Pacific Railroad Company and for its cause of action alleges and shows to the court that it is a corporation duly organized and existing under the laws of the state of Utah and is a citizen and resident of that state, with its principal office and post office address at Omaha, Nebraska, and that it is duly authorized to do business in the state of Kansas and is engaged in operating a railroad extending from Kansas City, Missouri through the state of Kansas to Denver and beyond, and that the defendants, Joseph E. Nedeau, Martha Nedeau, his wife, George Huntsman and James I. Anderson, are citizens and residents of the state of Kansas.

Plaintiff further alleges that The Leavenworth, Pawnee & Western Railroad Company was a corporation duly organized and existing according to law, and that by an act of Congress, entitled: "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes," approved July 1, 1862, and other acts of Congress amendatory thereof and supplemental thereto, it was granted a right of way 400 feet wide, being 200 feet on each side of its track, through the north ½
4 of the northeast ¼ of Section 24, township 10, range 12, the southwest ¼ of the northwest ¼ of section 13, the northeast ¼ of the southwest ¼ of section 13, the southeast ¼ of section 13, all in township 10, range 12, and the east ½ of the southeast ¼ of section 8, and west ½ of the southwest ¼ of section 9, township 11, range 14, Shawnee county, Kansas, and that it duly constructed its track thereon as the same is now located; that said The Leavenworth, Pawnee & Western Railroad Company duly changed its corporate name in 1863 to that of The Union Pacific Railroad Company, Eastern Division, and that it thereafter, in 1864, duly changed its corporate name to The Kansas Pacific Railway Company; that afterwards The Kansas, Pacific Railway Company, The Union Pacific Railroad Company, and The Denver, Pacific Railway & Telegraph Company were duly consolidated under and by virtue of the acts of

Congress above mentioned into the Union Pacific Railway Company; that by such consolidation The Union Pacific Railway Company became the owner of, and possessed of, all the railroads, rights of way, franchises and other properties of said constituent companies.

Plaintiff further alleges that it is the successor to, and the owner of, all the property in the state of Kansas formerly owned by The Union Pacific Railway Company, including said right of way 400 feet wide, being 200 feet on each side of its track as now located, through the north ½ of the northeast ¼ of section 24, township 10, range 12, the southwest ¼ of the northwest ¼ of section 13, the northeast ¼ of the southwest ¼ of section 13, and the southeast ¼ of section 13, all in township 10, range 12, and the east ½ of the southeast ¼ of section 8, and the west ½ of the southwest ¼ of section 9, township 11, range 14, east of 6th P. M. Shawnee County, Kansas, and that it is entitled to the immediate possession thereof, but that the defendants unlawfully keep it out of the possession of the outer 100 feet on the north side and the outer 150 feet on the
5 south side of the north ½ of the northeast ¼ of section 24, township 10, range 12, and the outer 100 feet on the north side, and the outer 150 feet on the south side of the southwest ¼ of the northwest ¼ of section 13, and also of the northeast ¼ of the southwest ¼ of section 13, and also the southeast ¼ of section 13, township 10 range 12, and the outer 150 feet on the south side of the east ½ of the southeast ¼ of section 8, and also of the west ½ of the southwest ¼ of section 9, township 11, range 14.

Plaintiff further alleges that the amount of real estate above described, the possession of which the defendants unlawfully withhold from the plaintiff, is — acres in area; that the value thereof is more than $3,000.00 and that the amount in controversy in this case is more than $3,000.00 exclusive of interest and costs.

Plaintiff further alleges that it has been damaged by reason of being kept out of the possession of said right of way, in addition to the aforesaid value of said real estate, in the sum of $2,000.00.

Wherefore, plaintiff prays judgment against said defendants for the possession of said land and for damages in the sum of $2,000.00 and for costs of suit.

R. W. BLAIR,
C. A. MAGAW,
T. M. LILLARD,
Attorneys for Plaintiff.

6

Præcipe.

The Clerk will please issue summons for Joseph E. Nedeau, Martha Nedeau, his wife, George Huntsman and James I. Anderson, defendants above named, directed to the United States Marshal of this district, returnable according to law.

R. W. BLAIR,
C. A. MAGAW,
T. M. LILLARD,
Attorneys for Plaintiff.

Filed in the District Court December 10, 1915.

Security for Costs.

We enter our security for costs in said case, and promise to pay all costs which may accrue to the opposite parties in this action, or to any of the officers of this Court. And in default of payment by the plaintiff of any costs ordered or adjudged to be paid by it, we hereby agree and stipulate that execution may issue against our property for any costs taxed against plaintiff.

Dated 2nd day of December, 1915.

UNION PACIFIC RAILROAD COMPANY,
By R. W. BLAIR, *Gen. Atty.*
F. M. BONEBRAKE.

7 Filed in the District Court December 10, 1915.

Summons, With U. S. Marshal's Return.

District Court of the United States of America, District of Kansas, *ss:*

The United States of America to the Marshal of the District of Kansas, Greeting:

You are hereby commanded to notify Joseph E. Nedeau, Martha Nedeau, his wife, George Huntsman and James I. Anderson that they have been *sued* by Union Pacific Railroad Company in the District Court of the United States for the District of Kansas, and that unless they answer by the 10th day of January, A. D. 1916, the petition of the said Union Pacific Railroad Company against them filed in the Clerk's office of the said Court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this writ on the 20th day of December, A. D. 1915.

Witness: the Honorable John C. Pollock, Judge of the District Court of the United States for the District of Kansas, and the Seal thereof, at Topeka, in said District, this 10th day of December, A. D. 1915.

[SEAL.] MORTON ALBAUGH, *Clerk,*
By F. L. CAMPBELL,
Deputy Clerk.

Suit brought for the recovery of money. Amount claimed $2,000.00 and possession of real estate and costs of this suit.

BLAIR, MAGAW & LILLARD,
Attorneys for Plaintiff.

8

U. S. Marshal's Return.

DISTRICT OF KANSAS, *ss:*

Received the within writ at Topeka, Kans., Dec. 14, 1915, and executed the same as follows, to-wit: Served on the within named Martha Nedeau by delivering to her personally a true and certified copy of this writ with all endorsements thereon at her usual place of residence and abode 2 miles east of St. Marys, Kans, and at the same time and place and with the aforesaid Martha Nedeau I left a copy of this writ with all endorsements thereon for her husband the within named Joseph E. Nedeau. Served on the within named George Huntsman by leaving a true and certified copy of this writ with all endorsements thereon with his wife, an adult member of his family, at his usual place of residence and abode 2 miles east of St. Marys, Kans., Dec. 17, 1915. Served on the within names James I. Anderson by delivering to him personally a true and certified copy of this writ with all endorsements thereon at Silverlake, Shawnee County, Kans., Dec. 17, 1915.

O. T. WOOD,
U. S. Marshal.
By J. M. MYERS, *Deputy.*

Fees $11.31.

Filed in the District Court December 20, 1915.

9

Stipulation Extending Time to Plead

It is hereby stipulated that the defendants in the above entitled cause shall have until the first day of February, 1916, within which to plead.

R. W. BLAIR,
Attorney for Plaintiff.
J. B. LARIMER,
HAZEN & GAW,
Attorneys for Defendants.

Filed in the District Court January 10, 1916.

Answer.

Come now the above named defendants by their attorneys, A. E. Crane, Hazen & Gaw and J. B. Larimer, and for answer to plaintiff's petition filed herein deny each and every, all and singular, the allegations and averments therein contained.

Wherefore, defendants pray judgment for their costs herein.

A. E. CRANE,
HAZEN & GAW,
J. B. LARIMER,
Attorneys for Defendants.

Filed in the District Court January 31, 1916.

10 *Amended Petition.*

Now comes Union Pacific Railroad Company and for its amended petition herein alleges that it is a corporation duly organized and existing under and by virtue of the laws of the state of Utah and a citizen and resident of that state; that its principal office and post office address are Omaha, Nebraska; that it is duly authorized to do business in the state of Kansas, and that it is engaged in operating a railroad extending from Kansas City, Missouri, through the state of Kansas to Denver, Colorado and beyond, and that the defendants, Joseph E. Nadeau, Martha Nadeau, his wife, George Huntsman and James I. Anderson are citizens and residents of the state of Kansas.

And plaintiff further alleges that it is the legal owner of and is entitled to the possession of the following described real estate, to wit:

The outer 100 feet on the north side and the outer 150 feet on the south side of a tract of land 400 feet in width, being 200 feet on each side of the center line of plaintiff's railroad track as now located through the north half of the northeast quarter of section 24, township 10, range 12, and also through the southwest quarter of the northwest quarter and also through northeast quarter of the southwest quarter of section 13, and through the southeast quarter of section 13, township 10, range 12; and also the outer 150 feet on the south side of a tract of land 400 feet in width, being 200 feet on each side of the center line of plaintiff's railroad track as now located through the east half of the southeast quarter of section 8, township 11, range 14, and through the west half of the southwest quarter of section 9, township 11, range 14, all east of the

11 sixth principal meridian in Pottawatomie County, Kansas.

Plaintiff further alleges that the defendants above named unlawfully keep the plaintiff out of the possession of said real estate.

Plaintiff further alleges that the real estate above described, the possession of which the defendants unlawfully withhold from the plaintiff, is — acres in area; that the value thereof is more than $3,000 and that the amount in controversy in this case is more than $3,000 exclusive of interest and costs.

Wherefore plaintiff prays judgment against the defendants for the possession of said real estate and for the costs of this action.

R. W. BLAIR,
C. A. MAGAW,
T. M. LILLARD,
Attorneys for Plaintiff.

Filed in the District Court March 30, 1916.

Stipulation.

It is hereby stipulated that on the trial of the above entitled cause that the answer filed on behalf of defendants to plaintiff's original petition was treated and considered as an answer to the

amended petition filed on behalf of plaintiff; and was so
12 treated and considered on the trial of said case.

E. A. CRANE,
J. B. LARIMER,
Z. T. HAZEN,
Attorneys for Defendants.
R. W. BLAIR,
Attorney for Plaintiff.

Filed in the District Court April 23, 1918.

Journal Entry of Continuance.

April 13, 1917.

It is ordered by the court that the above entitled case be and the same is hereby continued to the October 1917 term of said court, at Leavenworth, Kansas.

Entered in Journal "U" at page 443.

Stipulation Waiving Jury.

We, the attorneys for the respective parties hereby waive trial to the jury of this cause and agree to submit the same to the court without the intervention of a jury.

R. W. BLAIR,
T. M. LILLARD,
A. M. HAMBLETON,
13 *Attorneys for Plaintiff.*
J. B. LARIMER,
Z. T. HAZEN,
A. E. CRANE,
Attorneys for Defendants.

Filed in the District Court October 3, 1917.

14 *Agreed Statement of Facts.*

"To avoid making proof of undisputed facts it is hereby stipulated and agreed that the following facts are admitted for the purpose of the trial of this cause, which cause may be tried upon such admitted facts and such further testimony not inconsistent therewith as either party may introduce.

1. The plaintiff, Union Pacific Railroad Company, is a railroad corporation organized and existing under the laws of the state of Utah, and was at the date of bringing this action and still is a citizen and resident of that state.

2. The defendants, Joseph E. Nedeau, Martha Nedeau, George Hunt man and James I. Anderson, were at the date of the bringing

of this action and still are citizens and residents of the state of Kansas.

3. The amount in controversy in this action, exclusive of interest and costs, exceeds the sum of $3,000.

4. The Leavenworth, Pawnee & Western Railroad Company was a corporation created and existing under an act of the legislature of the territory of Kansas, enacted at the session of 1855, which is found in the laws of Kansas territory at page 915, and is the same Leavenworth, Pawnee & Western Railroad Company referred to in the 9th section of the act of Congress of July 1, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes."

5. November 14, 1862, The Leavenworth, Pawnee & Western Railroad Company accepted the act of July 1, 1862, a copy of which acceptance is attached hereto, marked exhibit A.

6. June 6, 1863, The Leavenworth, Pawnee & Western Railroad Company changed its name to Union Pacific Railway
15 Company, Eastern Division.

7. September 3, 1864, Union Pacific Railway Company, Eastern Division, accepted the provisions of the act of July 2, 1864, a copy of which acceptance is hereto attached, marked exhibit B.

8. April 5, 1869, Union Pacific Railway Company, Eastern Division, changed its name to Kansas Pacific Railway Company.

9. In 1880 the Kansas Pacific Railway Company was duly consolidated with The Union Pacific Railroad Company, a corporation created and existing under the act of Congress of July 1, 1862, above mentioned, and the Denver Pacific Railway & Telegraph Company, a corporation created by virtue of the laws of Colorado, and by such consolidation there was created a new corporation called The Union Pacific Railway Company.

10. By virtue of such articles of consolidation, The Union Pacific Railway Company became the owner and possessed all the railroads, rights of way, privileges, franchises and property owned by the three constituent companies.

11. The Leavenworth, Pawnee & Western Railroad Company, under the various names above mentioned, constructed its railroad from the Missouri River, at the mouth of the Kansas River, westerly along the north side of the Kansas River to mile post 105 and beyond and across the Pottawatomie Reservation and across the lands involved in this action.

12. May 8, 1866, the Secretary of the Interior, James Harlan, wrote the President, submitting the report of the commissioners appointed to examine the third section of the Union Pacific Railway, Eastern Division, commencing at the sixty second and terminating at the eighty-fifth mile post west of the boundary line between Kansas and Missouri. A copy of said letter and the report of the commissioners, with the action of the President endorsed thereon,
16 is hereto attached, marked Exhibit C, and made a part hereof.

13. July 7, 1866, the Secretary of the Interior, James Harlan, wrote the President, submitting the report of the commissioners

appointed to examine the fourth section of twenty miles of the Union Pacific Railroad, Eastern Division, commencing at the eighty-fifth and terminating at the one hundred and fifth mile post west of the boundary line between Kansas and Missouri. A copy of said letter, with the report of the commissioners and the action of the President endorsed thereon, is hereto attached, marked Exhibit D, and made a part hereof.

14. The railroad, extended from mile post 62 to mile post 105 included in the third and fourth sections above mentioned, and across the lands involved in this action, was constructed during the years 1865 and 1866. It was constru-ed as far as Silver Lake at mile post 78 and trains were in operation to that point on March 19, 1866. That part of the land involved in this action in sections 8 and 9, township 10, range 11, is located between mile post 78 and mile post 79. The other parcels of land involved herein are located near mile post 88 and are included in the fourth section of the railroad.

15. The third and fourth sections above mentioned extended from the sixty-second mile post and terminated at the one hundred and fifth mile post and included all the track across the Pottawatomie Reservation and such track is in its original location and is operated as a part of the plaintiff's line of railroad extending from Kansas City, Missouri, to Denver, Colorado and beyond.

16. The United States issued its bonds to the Union Pacific Railway Company, Eastern Division, at the rate of $16,000 per mile for that part of its track across the Pottawatomie Reservation.

17 November 1, 1897, the railroads, right of way, property and franchises of The Union Pacific Railway Company were sold to plaintiff under a decree of foreclosure rendered by the United States Circuit Court, District of Kansas, in a suit brought by the United States against The Union Pacific Railway Company to foreclose its lien under the bonds issued by it to the Leavenworth, Pawnee & Western Railroad Company and its successors.

17. On June 5th and 17th, 1846, the Pottawatomie Tribe of Indians entered into a treaty with the United States, which treaty was duly ratified by the senate of the United States on July 22, 1846. By article 4 of said treaty it was provided as follows:

The United States agree to grant to the said United Tribes of Indians possession and title to a tract or parcel of land containing 576,000 acres, being 30 miles square, and being the eastern part of the lands ceded to the United States by the Kansas Tribe of Indians, by treaty concluded on the 14th day of January and ratified on the 15th day of April of the present year, lying adjoining the Shawnees on the south and the Delawares and Shawnees on the east, on both sides of the Kansas River, and to guarantee the full and complete possession of the same to the Pottawatomie Nations, parties to this treaty, as their land and home forever, for which they are to pay the United States the sum of $87,000, to be deducted from the gross sum promised to them in the third article of this treaty.

The land involved in this action is located within the aforesaid reservation. For greater certainty reference is made to the treaty, 9 statutes at large 853.

18. On November 15, 1861, the Pottawatomie Tribe of Indians made a further treaty with the United States, which treaty was ratified by the United States Senate on April 15, 1862. By the terms of this treaty it was provided that the reservation, consisting of 576,000 acres, which was acquired by the Pottawatomie Indians for the sum of $87,000 by the fourth article of the treaty with the United States on the 23rd day of July, 1846, should be allotted in severalty to those of said tribe who had adopted the customs of the
18 whites and desired a separate tract assigned to them, and it was further provided in said treaty that the reservation should be surveyed in the same manner as public lands. Article 2 of that treaty reads as follows:

Art. 2. It shall be the duty of the agent of the United States for said tribe to take an accurate census of all the members of the tribe, and to classify them in separate lists, showing the names, ages, and numbers of those desiring lands in severalty, and of those desiring lands in common, designating chiefs and headmen, respectively; each adult choosing for himself or herself, and each head of a family for the minor children of such family, and the agent for orphans and persons of unsound mind. And thereupon there shall be assigned, under the direction of the Commissioner of Indian Affairs, to each chief at the signing of the treaty, one section; to each headman, one-half section; to each other head of a family, one quarter section; and to each other person eighty acres of land, to include, in every case, as far as practicable, to each family, their improvements and reasonable portions of timber, to be selected according to the legal subdivision of the survey. When such assignment shall have been completed, certificates shall be issued by the Commissioner of Indian Affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned, respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs. Until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee or leased or otherwise disposed of only to the United States, or to persons then being members of the Pottawatomie tribe and of Indian blood, with the permission of the President, and under such regulations as the Secretary of the Interior shall provide, except as may be hereinafter provided. And on receipt of such certificates, the person to whom they are issued shall be deemed to have reliquished all right to any portion of the lands assigned to others in severalty, or to a portion of the tribe in common, and to proceeds of sale of the same whensoever made.

For greater certainty reference is made to the treaty, 12 statutes at large 1191.

19. On January 19, 1863, the Commissioner of Indian Affairs was called upon to construe the aforesaid treaty of 1861 with the Pottawatomie Indians with reference to the rights of Indians who had deceased after the treaty was entered into and before that date. In compliance with such request, the Commissioner of Indian Affairs wrote to W. W. Ross, United States Indian Agent, as follows:

"Department of the Interior,

Office Indian Affairs,

January 19, 1863.

19 W. W. Ross, Esq., U. S. agent, present.

SIR: I have to acknowledge your communication of December 10, 1862, enclosing resolution passed by the Pottawatomie Business Committee relative to allowing heirs of deceased members of the tribe who were living at the date of the treaty to draw their proportion of land. In reply, I have to say that according to the construction given to said treaty by this office, all persons of the Pottawatomie Nation who were alive at the date thereof became entitled to lands in severalty upon the ratification of the treaty by the senate. It follows as a consequence of this construction that in case any such person has deceased since the date of the treaty (that being the time the right of such person accrued) his or her heirs as such will be entitled to receive the certificate of allotment to which such deceased person would have been entitled had he or she continued to live.

Very respectfully,

Your obt. servt.,

WILLIAM P. DOLE,

Commissioner."

20. Subsequent to July 1, 1862, and pursuant to the said treaty of 1861, with the Pottawatomie Indians a census of the Indians was made in accordance therewith and certificates of allotments were issued to the allottees in accordance with the said treaty and as provided therein, and that commissioners were appointed January 16, 1863, by the United States to make the allotments and in November, 1863, the said commissioners submitted their report of the allotments made, which allotments included the land in question in this action, and on December 12, 1864, the allotments were duly approved by the Secretary of the Interior as follows:

"Department of the Interior,

December 12, 1864.

The foregoing list of Pottawatomie allotments made under the second article of the treaty with that tribe of November 15, 1861, is hereby approved.

J. P. USHER, *Secretary.*"

21. That in each case the allotments involved in this action were allotted to members of said tribe of Indians living upon the same and having improvements thereon when the treaty was made on November 15, 1861, and that said Indians continued to live upon said allotments from said date until the allotments were approved by the Secretary of the Interior.

20 22. Under article 5 of said treaty of 1861 with the Pottawatomie Indians it was provided, among other things, as follows:

The Pottawatomies believing that the construction of the Leavenworth, Pawnee and Western Railroad from Leavenworth City to the Western boundary of the former reserve of the Delawares is now rendered reasonably certain, and being desirous to have said railroad extended through their reserve, in the direction of Fort Riley, so that the value of the lands retained by them may be enhanced, and the means afforded them of getting the surplus product of their farms to market, it is provided that the Leavenworth, Pawnee and Western Railroad Company shall have the privilege of buying the remainder of their lands within six months after the tracts herein otherwise disposed of shall have been selected and set apart, provided they purchase the whole of such surplus lands at the rate of $1.25 per acre.

And if said company, make such purchase it shall be subject to the consideration following, to-wit: They shall construct and fully equip a good and sufficient railroad from Leavenworth City to a point half-way between the western boundary of the said former Delaware reserve and the western boundary of the said Pottawatomie reserve, (being the first section of said road,) within six years from the date of such purchase, and shall construct and fully equip such road from the said last-named point to the western boundary of said Pottawatomie reserve, (being the second section of said road,) within three years from the date fixed for the completion of said section; and no patent or patents shall issue to said company or its assigns for any of said lands purchased until the first section of said railroad shall have been completed and equipped, and then for not more than half of said lands, and no patent or patents shall issue to said company or its assigns for any of the remaining portion of said lands until said second section of said railroad shall have been completed and equipped as aforesaid; and before any patents shall issue for any part of said lands payment shall be made for the lands to be patented at the rate of $1.25 per acre; and said company shall pay the whole amount of the purchase money for said lands in gold or silver coin, to the Secretary of the Interior of the United States, in trust for said Pottawatomie Indians, within nine years from the date of such purchase, and shall also in like manner pay to the Secretary of the Interior of the United States, in trust as aforesaid, each and every year, until the whole purchase-money shall have been paid, interest from date of purchase, at six per cent per annum, on all the purchase money remaining unpaid.

And the company shall have the perpetual right of way over the lands of the Pottawatomie not sold to it for the construction and operation of said railroad, not exceeding 100 feet in width, and the right to enter on said lands and take and use such gravel, stone, earth, water, and other material, except timber as may be necessary for the construction and operation of said road, making compensation for any damages to improvements done in obtaining such material, and for any damages arising from the location or running of said road

to improvements made before the road is located. Such damages and compensation, in cases where said company and the persons whose improvements are injured or property taken cannot agree to be ascertained and adjusted under the direction of the Commissioner of Indian Affairs.

For greater certainty reference is made to the treaty, 12
21 statutes at large 1191.

23. On July 1, 1862, an act of congress was passed entitled: "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean and to secure to the government the use of the same for postal, military and other purposes." By section 2 of that act a right of way was granted through the public lands to the extent of 200 feet in width on each side of said Union Pacific Railroad where it might pass over the public lands and section 7 of that act reads as follows:

That said company, shall file their assent to this act, under the seal of said company, in the Department of the Interior, within one year after the passage of this act, and shall complete said railroad and telegraph from the point of beginning as herein provided to the western boundary of Nevada Territory before the first day of July, one thousand eight hundred and seventy-four; Provided, that within two years after the passage of said act said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from pre-emption, private entry, and sale; and when any portion of said route shall be finally located, the Secretary of the Interior shall cause the said lands hereinbefore granted to be surveyed and set off as fast as may be necessary for the purposes herein named.

Section 9 of said act provides:

And be it further enacted that the Leavenworth, Pawnee & Western Railroad Company of Kansas are hereby authorized to construct a railroad and telegraph line from the Missouri River at the mouth of the Kansas River on the south side thereof so as to connect with the Pacific Railroad of Missouri, to the aforesaid point on the one hundredth meridian of longitude west from Greenwich as herein provided, upon the same terms and conditions in all respects as are provided in this act," etc.

23*a*. Subject to all legal objections it is further agreed that on July 4, 1862, the Leavenworth, Pawnee & Western Railroad Company filed in the Department of the Interior a map showing the probable route of its road west of Lawrence along the left bank of the Kansas River and across the Pottawatomie reservation to a connection with the Union Pacific in Nebraska. July 18, 1862, the Commissioner of the General Land Office acknowledged the receipt and filing of that map by writing the company:

"I have to state that under the provisions of the 7th section of the Act of Congress of July 1st, 1862, orders have been issued by this office under date of the 17th inst. to the proper District Land Officers

in Kansas and Nebraska for the withdrawal of all the public land within fifteen miles on each side of said route from 'pre-emption, private entry and sale.'"

22 Copies of the letter of the company of July 4, 1862, the answer of the commissioner of July 18, 1862, and of his letters of withdrawal to the Registers and Receivers are attached and made a part hereof, marked exhibit E.

24. On July 2, 1864, an act of Congress was passed amending said act of 1862 and giving further time to the railroad companies named therein to comply with the provisions of said act of Congress of 1862, as amended, by said act of July 2, 1864. Section 3 of said act of July 2, 1864, provides as follows:

And be it further enacted that the Union Pacific Railroad Company, and all other companies provided for in this act and the act to which this is an amendment, be and hereby are empowered to enter upon, purchase, take and hold any land or premises that may be necessary and proper for the construction and working of said road, not exceeding in width 100 feet on each side of its center line, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary or proper for turnouts, standing places for cars, depots, station house or any other structures required in the construction and operation of said road.

25. By section 5 of said Act of Congress of July 2, 1864, it was provided as follows:

And be it further enacted that the time for designating the general route of said railroad, and of filing the map of the same and the time for the completion of that part of the railroad required by the terms of said act of each company be and the same is hereby extended one year from the time in said Act designated.

That the map of the general route of the Union Pacific Railroad Company, Eastern Division required by the aforesaid section was not prepared until June 23, 1865, by said company, and was not filed in the general land office until the 1st day of July, 1865, and that at the time of filing there was endorsed on the map the following:

"Office of Chief Engineer,

Union Pacific Railway Company, Eastern Division.

Wyandotte, Kansas,

June 23, 1865.

The line in red ink upon this map shows the general route of the Union Pacific Railway, Eastern Division from a point upon the state line between Missouri and Kansas to the point upon the one hundredth meridian of West Longitude, where said road may unite with the Union Pacific Railroad.

W. J. KEELER,
Chief Engineer."

23 "This map of the general route of the Union Pacific Railway Eastern Division is adopted and approved by the Railroad Company, June 23, 1865.

JOHN D. PERRY,
President of the U. P. Ry. Co., E. D."

26. The Union Pacific Railway Company, Eastern Division filed its map of definite location on the 11th day of January, 1866, and the line as shown by that map, passed through the lands involved in this action.

That map carries the following inscription:

"Union Pacific Railway Company, E. D., map Missouri State line west to Fort Riley, 134 miles, one mile to an inch, May, 1865."

"I hereby certify that the plain red line on the map is a correct delineation showing the same as is definitely located from Lawrence to Fort Riley by the Union Pacific Railway Co., E. D., and showing also the connection of said line with the U. S. public land survey.

Wyandotte, July —, 1865.

R. M. SHOEMAKER,
Chief Engineer."

"Office of U. P. Ry. Co., E. D.

St. Louis, Missouri, May —, 1865.

In compliance with the law of Congress to amend an act entitled 'An act to aid in the construction of a Railroad and Telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes.' Approved July 1, 1862. Amended July 2, 1864. For the purpose of filing with the department of Interior at Washington D. C., the crossed red line indicates that portion of the Union Pacific Railway E. D. and telegraph line constructed and in operation from the Missouri state line, including the Wyandotte branch on the Missouri River to Lawrence 40.06 miles; and the plain red line the final location from Lawrence to Fort Riley.

Survey of the first 40 of U. P. E. D. commenced September 28, 1863."

27. By section 12 of said act of July 2, 1864, it was provided that the railroad company might build its railroad on the opposite side of the Kansas River from Lawrence and Topeka if deemed advisable.

It was provided by section 2 of the act of July 1, 1862, that:

The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under operation of this act and required for the said right of way and grants hereinafter made.

No steps have ever been taken by the United States to extinguish the Indian titles insofar as the land described in plaintiff's petition is

concerned, or to any land within the Pottawatomie Indian Reservation covered by the treaty of 1846.

24 28. Neither the Leavenworth, Pawnee & Western Railroad Company nor any of its successors bought the surplus land or any part of it, as it was given the privilege of doing under article 5 of the treaty of 1861 (12 statutes at large 1191). The reservation was surveyed after July 1, 1862; the allotments were made and the surplus land were then sold to the Atchison, Topeka & Santa Fe Railway Company, a Kansas corporation, at $1.00 per acre, under terms of the treaty of February 27, 1867 (15 Stat. 535).

29. Patents were duly issued to the allottees of the lands involved herein. Such patents made no reservation of a right of way. The defendants claim title through mesne conveyances under said treaty of 1861, and the allotments made thereunder and the patents issued in accordance there with and continuous occupancy and possession of said land. The plaintiff as the successor of the Leavenworth, Pawnee and Western Railroad Company claims a right of way four hundred feet wide, being two hundred feet on each side of its track through the lands described in the petition, under the act of July 1, 1862, and acts amendatory of and supplemental thereto.

30. Joseph E. Nedeau, defendant, is the holder of the record title to the various parcels of land described in the petition, which he acquired at different dates, the earliest date being June 15, 1891. The other defendants hold under defendant Nedeau. Patents were issued to the allottees for the various allotments at different dates, the earliest being June 14, 1867.

31. The plaintiff, Union Pacific Railroad Company, and its predecessors have continuously maintained a fence on each side of its track 50 feet from the center thereof through the Pottawatomie Reservation, except at stations, which was the standard for fences along its entire line in Kansas, and defendants and their grantors have

25 claimed to own and have used and cultivated and been in the actual possession of all the land outside of said fences since said railroad was constructed, and have paid taxes thereon continually. The plaintiff and its predecessors have continuously returned the right of way as a whole and have paid the taxes assessed against it.

32. The entire acts of Congress herein referred to and all acts amendatory of and supplemental thereto and the treaties herein referred to as well as the treaty of February 27th, 1867, between the United States and the Pottawatomie tribe of Indians (15 Stat. 531) are to be considered as evidence as far as they are material to the issues the same as if formally introduced at the trial.

33. Subject to all legal objections, it is agreed that the statute of limitations of Kansas is as follows:

Actions for the recovery of real property, or for the determination of any adverse claim or interest therein, can only be brought within the period hereinafter prescribed, after the cause of action shall have accrued, and at no time thereafter.

First. An action for the recovery of real property sold on execu-

tion, brought by the execution debtor, his heirs, or any person claiming under him, by title acquired, after the date of the judgment, within five years after the date of the recording of the deed made in pursuance of the sale.

Second. An action for the recovery of real property sold by executors, administrators or guardians, upon an order or judgment of a court directing such sale, brought by the heirs or devisees of the deceased person, or the ward or his guardian, or any person claiming under any or either of them, by title acquired after the date of the judgment or order, within five years after the date of the recording of the deed made in pursuance of the sale.

Third. An action for the recovery of real property sold for taxes, within two years after the date of the recording of the tax deed.

Fourth. An action for the recovery of real property not hereinbefore provided for, within fifteen years.

Fifth. An action for the forcible entry and detention or forcible detention only, of real property within two years. (6905, Gen. Stat. 1915.)

R. W. BLAIR,
T. M. LILLARD,
A. M. HAMBLETON,
Attorneys for Plaintiff.
J. B. LARIMER,
Z. T. HAZEN,
A. E. CRANE,
Attorneys for Defendants.

26 EXHIBIT A.

United States of America.

Department of the Interior.

Washington, D. C.,

August 20, 1903.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original on file in this Department.

In testimony whereof I have hereunto subscribed my name and caused the Seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.]

E. A. HITCHCOCK,
Secretary of the Interior.

Department of the Interior.

December 23rd, 1862.

SIR: Your letter of the 15th ultimo accepting the provisions of the 9th section of the Act of Congress of the 1st July, 1862, to aid in the

construction of a railroad &c. from the Missouri River to the Pacific Ocean, was duly received and filed in this Department.

Very respectfully,
Your obt. servant,

CALEB B. SMITH, *Secretary.*

J. H. McDowel, Esq., Prest. of the Leavenworth, Pawnee & Western R. R., Leavenworth City, Kansas.

1862, Nov. 14.

At a called meeting of the directors of the Leavenworth, Pawnee & Western Railroad Company, held this day at the office of the said company at the city of Leavenworth, at which were present J. H. McDowell, President, I. C. Stone, Amos Rees, A. I. Isacks and R. P. C. Wilson, the President in the chair, the following resolution by A. I. Isacks was unanimously adopted, viz:

"Resolved on this Nov. 14, A. D. 1862, that the Leavenworth, Pawnee & Western Railroad Company hereby accept the conditions of the act of Congress entitled: "An Act to aid in the construction of railroad and telegraph line from the Missouri River to the Pacific Ocean and to secure to the Government the use of the same for postal, military and other purposes — approved July 1, 1862," so far as the same relates to said company, and that a certified copy hereof be forwarded by the President of the Railroad Company without delay to the Secretary of the Interior with a request that the same be filed in the Interior Department as required by said act, and also a certified copy of the contract of this company with Mess. Ross, Stell & Co. for the construction and equipment of the railroad from the Missouri River at the mouth of Kansas river on the south side thereof, so as to connect with the Pacific Railroad of Missouri to the one hundredth meridian of longitude west from Greenwich, as is provided in said act.

J. H. McDOWELL, *President.*

SAM DENMAN, *Secretary.*

27 I hereby certify the above & within to be a true copy taken by me from the original Entry in the Books of the Company.

SAM DENMAN,
Sec. L., P. & W. R. R. Co.

Leavenworth City, Nov. 14, 1862.

EXHIBIT B.

Department of the Interior.

Washington, D. C.,
13th Nov., 1872.

I, Columbus Delano, Secretary of the Interior, do hereby certify that the annexed papers are true copies from the files and records of this department.

In Testimony whereof, I have hereunto subscribed my name, and caused the Seal of the Department to be affixed, the day and year above written.

[SEAL.]

C. DELANO,
Secretary of the Interior.

Department of the Interior.

September 9th, 1864.

SIR: I hereby acknowledge the receipt of your letter of the 5th instant, transmitting a certified copy of a resolution passed by the Board of Directors of the Union Pacific Railway Company, Eastern Division to accept the provisions of the Act of Congress entitled "an Act to amend an Act entitled An Act to aid in the construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same, for Postal, Military and other purposes: Approved July 1st, 1862." Approved July 2nd 1864, and to inform you that the said resolution *had* been placed on the files of the Department.

I am, sir,
Very respectfully,
Your obt. servant,

WM. T. OTT,
Acting Secy. of the Interior.

John P. Devereux, Esq., Secretary U. P. R. R. Co., E. D., St. Louis, Missouri.

Union Pacific Railway Company.

Eastern Division.

Saint Louis,

Sept. 5th, 1864.

Hon. J. P. Usher, Secretary Interior, Washington City:

As directed to do, I enclose copy of a Resolution passed at a meeting of our Board on the 3rd inst., accepting the provisions
28 of an act entitled "an Act to amend an Act to aid in the construction of a Railroad and Telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for Postal, Military and other purposes. Approved 2nd July 1864, and ask that the same may be filed in your Department, and its receipt acknowledged.

Very respectfully,
Your obt. servant,

JNO. P. DEVEREUX, *Secretary.*

Resolved, that this Company does hereby accept the provisions of an Act of the Congress of the United States entitled "An Act to

amend an act entitled an Act to aid in the construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean and to secure to the Government the use of the same for Postal, Military and other purposes." Approved 2nd July 1864. And the Secretary of this Company is hereby required under the seal of the Company to transmit to the proper officers of the Government certified copies of this resolution.

Office of the Union Pacific Railway Company, E. D.

Saint Louis, Mo.,

September 5th, 1864.

I hereby certify that the foregoing is a true copy of a resolution as taken from the records of this Company and passed at a meeting of its Board held on the 3rd inst.

In testimony whereof and in pursuance of said resolution, I have hereunto set my hand and affixed the seal of said Company, the day and year aforesaid.

[SEAL.] JNO. P. DEVEREUX, *Secretary.*

EXHIBIT C.

Union Pacific R. R., E. D.

Report of Commissioners on 3rd Section, 23 Miles, 62nd Mile to 85th Mile.

Commissioners' report dated April 13, 1866.
President's acceptance dated May 8th, 1866.

(Endorsement:) Dept. of Interior, May 8, 1866. James Harlan, Secretary.

29 Submits report of Commissioners on third section of twenty three miles of U. P. R. R., E. D. with recommendation on the subject.
62085.

Executive Mansion,

May 8th, 1866.

The within recommendations of the Secretary of the Interior are approved and the Secretary of the Treasury and himself are hereby directed to carry the same into effect.

ANDREW JOHNSON,
Pres. U. S.

Department of the Interior.

Washington, D. C.,
May 8th, 1866.

SIR: I have the honor to submit herewith for your action, the report of the Commissioners, Lieut. Colonel J. H. Simpson, Maj. Genl. Samuel R. Curtis and Hon. Wm. M. White, appointed by you to examine and report upon the third section of the Union Pacific Railroad, Eastern Division, commencing at the sixty second and terminating at the eighty fifth mile post west from the initial point on the boundary line between Kansas and Missouri.

The commissioners in their report point out some defects in width of embankments and cuts and of drainage and they are not satisfied with the permanence of the center trestle bridge over Big Soldier Creek. In view, however, of the difficulties of earth work during the past winter on this section on account of frosts, and the annexed agreement signed by John D. Perry, President and R. M. Shoemaker, Chief Engineer of the road in which they obligate themselves in behalf of the company to remedy the defects specified in the report of the Commissioners and in view of the pressing need of the rapid progress of the road for the purposes of transportation of supplies by the Government to its troops in New Mexico and Colorado, the Commissioners recommend, subject to the agreement made by the company as above stated and to law, the acceptance of said third section as supplied for the present business of the road, with all the necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture and all other appurtenances of a first class railroad.

In view of the report of the Commissioners I respectfully recommend the acceptance of the said third section of twenty three miles.

I am, sir, with great respect,
Your obt. servant, JAS. HARLAN, *Secretary.*

To the President.

Wyandotte, Kan.,
April 13, 1866.

J. H. Simpson, S. R. Curtis, & W. M. White, Commissioners.

Report on Third Section of 23 Miles of U. P. R. R., E. D.

See letter to Pres. U. S., April 20, 1866.

30

Wyandotte, Kansas,

April 13-66.

Hon. James Harlan, Secretary of the Interior, Washington, D. C.

SIR: Agreeable to your instru*d*tions of the 5th inst. the undersigned Commissioners on yesterday examined the third section of the

Union Pacific Railroad, Eastern Division of twenty three miles, included between Stations No. 1155 plus 48 ft. of 2nd 40 miles, or the sixty second mile post west from the boundary line between Kansas and Missouri, and Station No. 264, of third 40 miles, or the eighty fifth mile post from said State Line. They report the condition of said section as follows:

Length of level grades	4.02	miles
Grade 0 to 10 ft. per mile	15.21	"
" 10 to 21 " " "	3.77	
Total	23.00	miles
Alignment:		
Straight line	20.33	miles
Curved "	2.67	"
Total	23.00	miles

Total curvature 219 degrees.

Curves with minimum radius of 1433 ft	0.42	miles
" " radius of 5730 ft.	2.25	"
	2.67	miles

Bridges.—There are on this section two Queen post bridges resting on stone masonry piers, one sixty feet long over Indian Creek, the other over Big Soldier Creek, of two spans of sixty feet each, having a center trestle pier protected at bottom by stone. In addition there are two trestle bridges of twenty feet spans, aggregating one hundred and sixteen feet in length.

Culverts.—There are three open wooden and seven stone culverts, with maximum span of ten feet.

The Cross Ties are of Oak, Red Elm, Locust, Red Hickory, Coffee Bean, Cherry, Mulberry, Black Walnut, Ash and Hackberry—seven and a half to nine feet long, six inches thick and probably averaging eight inches face, and laid from twenty two hundred to twenty four hundred and forty to the mile.

The Iron Rails were all made at the Allentown and Johnstown Iron Works, Penna., of the best American Iron and weigh fifty six pounds per lineal yard.

The Chairs, were made at Cincinnati, Ohio, of best American chair plate, iron seven and one half (7½) by eight (8) inches, and weigh from ten (10) to twelve (12) pounds each.

The Spike- were made at Cincinnati, Ohio of best spike iron, 9-16 inches square.

Sidings.—There are sixteen hundred feet of siding at Topeka and five hundred feet at Stone House.

Depots.—There is a good depot, one hundred and fifty by thirty feet and an engine house thirty by sixty feet at Topeka.

Rolling Stock.—The Company now own—
Nine engines.
Ninety four flat cars.
31 One hundred and one box cars.
Twenty two hand cars
Three first class coaches
One baggage car.

In addition to the above your Commissioners are informed by the Chief Engineer of the road, Mr. R. M. Shoemaker, contracts have been made for the delivery in the months of April and May, present year, for nine (9) first class coaches and two (2) baggage cars, of which two of the coaches and two baggage cars are now en route for this place.

Telegraph Line.—The Company have built a good telegraph line along this section, connecting with that formerly built along the preceding sections, and affording communications with the various lines extending to the Atlantic Coast.

A profile of the section showing the alignment and grades, is herewith submitted. The map of the road including this third section, is already on file in your Department.

Your Commissioners respectfully report that they found the general alignment and grades unexceptional. The embankments and cuts in some places are too narrow, and the drainage defective, for want in some places of ditches, and where these have been made they have not been properly formed—nor made sufficiently continuous to insure a dry road bed. Neither are your Commissioners satisfied with the permanence of the center trestle pier of the bridge over Big Soldier Creek. They also find while the rails are all spiked to each tie, on the outer side of the *rail*, they are only spiked to each alternate tie on the inside.

In view of the difficulties of earth work during the past winter on this section on account of frosts and the annexed agreement signed by John D. Perry, President, and R. M. Shoemaker, Chief Engineer of the road, wherein they obligate themselves in behalf of the company, to remedy the defects specified above and in view of the pressing need of the rapid progress of the road for purposes of transportation of supplies by the Government to its troops in New Mexico and Colorado; your Commissioners respectfully recommend, subject to the agreement made by the Company as above, and to law, the acceptance of said third section, as supplied for the present business of the road, with all the necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places depots, equipments, furniture and all other appurtenances of a first class railroad defined by us in former reports concerning the previous sections of the road.

J. H. SIMPSON,
Lt. Col. Engrs., U. S. A.;
S. R. CURTIS,
Maj. Genl.;
WM. M. WHITE,
Commissioners.

Office of the Union Pacific Railway, E. D.

Wyandotte, Kansas,

April 13, 1866.

As the Commissioners authorized and required to inspect the third (3rd) section of this road, desire that a better finish may be made to some portions of the section so as to conform to a general understanding of a road as determined by a convention of railroad Directors and Commissioners held in Washington City, pending the construction of this section, to-wit, between the first and tenth of
32 February, A. D., 1866. And for the purpose of avoiding errors and disputes concerning the construction of these specifications, and the Law of the matter, it is agreed as follows:

1st. The cuts and fills at certain points of the section now under consideration, to wit, that between the sixty second and eighty fifth miles; shall be extended in width at certain points so as to conform substantially with the specifications expressed in said pamphlet report of the Washington convention aforesaid.

2nd. The side ditches shall be cleaned out more effectually so as to form better shaped and continuous drains.

3rd. Spikes shall be added where any deficiency exists on alternate ties on the inside, so as to make an out and in spike at each end of each tie.

4th. The wooden pier at Big Soldier Bridge shall be protected with stone, to ensure its stability to the entire satisfaction of the Commissioners and is not taken as a precedent to be followed in the future.

5th. These things shall be done on this third (3rd) section now under consideration, before examination or approval shall be made by the Government Commissioners of any work beyond the eighty fifth (85th) mile.

JOHN D. PERRY, *Pres.*
R. M. SHOEMAKER,
Chief Engr.

33 EXHIBITS D.

Union Pacific R. R. Co., E. D.

Report of Commissioners on 4th Section, 20 Miles, 85th Mile to 105 Mile.

Commissioners' report dated June 26, 1866.
President's acceptance dated July 7th, 1866.

(Endorsement:) Dept. of the Interior, July 7th, 1866. James Harlan, Secretary. 4th Section, 85-105.

Submits to the Pres. of the U. S. report of Comrs. appointed to examine 4th section of 20 miles of U. P. R. R., E. D., with recommendations on the subject.

Executive Mansion,

July 7th, 1866.

The within recommendations of the Secretary of the Interior are approved and the Secretary of the Treasury and himself are hereby directed to carry the same into effect.

ANDREW JOHNSON,
President of the U. S.

Department of the Interior.

Washington, D. C.,

July 7th, 1866.

SIR: I have the honor to submit herewith for your action, the report of the Commissioners, Brevet Brg. General J. H. Simpson, U. S. A., Hon. Wm. M. White and Hon. Wm. Prescott Smith, appointed by you to examine and report upon the fourth section of twenty miles of the Union Pacific Railway, Eastern Division, commencing at the 85th post and terminating at the 105th mile post, west from the boundary line between the States of Missouri and Kansas.

The Commissioners point out in their report certain defects in the section examined but inasmuch as they are such as may be easily remedied and as the Company, through its President John D. Perry, Esq., has agreed to remedy said defects within such time as this Department indicates which agreement is herewith enclosed, and since the Company are correcting defects found on previous sections, I respectfully recommend the acceptance of said section of twenty miles, on the express understanding that hereafter no section shall be accepted until it is found to be completed in every respect as required by law and *and* that all defects of preceding sections
34 have been fully remedied and that the said Company be notified of the President's decision in the premises.

I am, sir, with great respect,
Your obt. servant,

JAS. HARLAN, *Secretary.*

The President of the U. S.

(Endorsement:) Leavenworth, Kans., June 26, '66. Gen. J. H. Simpson, Wm. M. White, Wm. P. Smith. Report on fourth section of 20 miles of the Union Pacific Railway Eastern Division. (Stamp.) Engineer Office, Dept. of Interior, Jul. 2, 1866.

Leavenworth, Kansas,

June 26, 1866.

Hon. James Harlan, Secretary of the Interior, Washington, D. C.

SIR: Agreeable to your instructions of the 19th instant, communicated by telegraph, the undersigned Commissioners, appointed by the President of the United States to examine the Union Pacific Railway, Eastern Division, have inspected the fourth section of said road and respectfully submit the following report.

Said section commences at the 85th mile station and terminates at the 105 mile, west from the boundary line between the States of Missouri and Kansas, making total length of section, 20 miles.

Length of level grade	3.83	miles
" grade 0 to 10 ft. per mile	8.25	"
" " 10 to 20 " " "	4.96	"
" " 20 to 30 " " "	2.96	"
	20.00	miles

The alignment is as follows:

Total straight line	18.10	miles
" curved "	1.90	"
	20.00	miles

Total degrees of curvature 138 degrees 48′.

The road bed has been laid out with same dimensions as the previous stations examined.

Bridges.—There are on this section 3 Howe Truss bridges, resting on stone abutments, 2 of 50 feet span each, and one of 133 35 feet; also one of 35 feet span and one of 90 feet, both resting on trestles standing on masonry footings. There are also 2 ordinary trestle bridges, one 180 feet long, the other 80 feet, making in all 7 bridges.

The culverts are 20 in number; 13 open, 6 box, and 1 stringer; 7 of them masonry, the balance wood.

The cross ties are of oak, red elm, locust, and red hickory, coffee bean, cherry, mulberry, black walnut, ash and hackberry, 7½ feet long, 6 inches thick, generally of large size, 2440 to the mile.

The iron rails were all made at the Allentown and Johnstown Iron Works, Penna. of the best American iron, and weigh 56 pounds per lineal yard. The chairs were made at Cincinnati, O., of the best American plate iron, 7½ by 8 inches, and weigh 10 to 12 pounds each. The spike- were also made at Cincinnati of best American spike iron, 9-16 inches square.

There have been built two switches, each 1000 feet long; one at St. Mary's Station and one at Wamego.

A watertank has been constructed at the Vermillion station; and a freight depot is being put up at Wamego.

Rolling stock.—The company now own and have in use the following stock:

9 locomotive engines.
94 flat cars.
101 Box "
27 Hand "
6 first class passenger Coaches.
2 Baggage, mail and express cars.

The road is now open for business from the State Line to Wamego, 104 miles, and trains are daily running on same.

Your Commissioners find the alignment, grades and curves of this section unexceptional. The embankments and cuts in some instances, however, have been made too narrow, and sufficient attention has not been paid to the side drainage in the cuts. They also find that in such instances, and in some cases for considerably long distances, the ties have been laid directly on the prairie, with no side ditches to drain the road bed. They further find that probably not half of the section has been filled in between the ties or ballasted. The telegraph has been built along the section and is in connection with the lines East.

In regard to the defects pointed out in the last report of the Commissioners on the third section your Commissioners were pleased to see they have been in the main, though not yet perfectly rectified. They however notice that the Company is proceeding in good faith to carry out the requirements of that report. Your Commissioners also report a very marked improvement in the road bed and drainage in the whole length of the road already reported on.

In conclusion, your Commissioners respectfully recommend the acceptance of this fourth section of 20 miles, beginning at the 85th and terminating at the 105 mile station, with the express understanding however that the Company will proceed in good faith to supply the defects pointed out in this report; and that this condition will be regarded in the acceptance of the next section when presented for examination.

A map and profile of the section accompanies this report.

All of which is respectfully submitted.

J. H. SIMPSON,
Brt. Brig. Genl., U. S. A.;
WM. M. WHITE,
WM. PRESCOTT SMITH,
Commissioners.

36 (Endorsement:) Union Pac. E. D. now Kansas Pac. Washington, D. C. July 2, 1866. John D. Perry, Pres. U. P. Ry. Co. E. D.

Agrees to remedy certain defects pointed out in report of commissioners on fourth section within such time as the Department may indicate.

Recd. July 2d, 1866.

Washington, D. C.,

July 2nd, 1866.

Hon. James Harlan, Secretary of the Interior.

SIR: I have the honor to acknowledge receipt of copy of report of the Commissioners upon the fourth section of twenty miles, being to the 105 mile post, of the Union Pacific R. W., E. D.

While the general tone of that report is decidedly favorable, there are a few comparatively unimportant defects referred to. These defects the Company will engage to remove within such time as your Department may indicate.

I am, sir,

Yours very respectfully,

JOHN D. PERRY,
President, Union Pacific R. W. Co., E. D.

EXHIBIT E.

Department of the Interior.

General Land Office.

Washington, D. C.,

May 12, 1917.

I hereby certify that the annexed copy of a letter from Thomas Ewing, Jr., and photographic copies of the maps accompanying the same indicating the probable route of the Leavenworth, Pawnee and Western Railroad Company, under the act of July 1, 1862, are true and literal exemplifications of the originals on file in this office.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] C. M. BRUCE,
Assistant Commissioner of the General Land Office.

mce.-l-f

Washington, D. C.,

July 4th, 1862.

To the Comsr. of the Genl. Land Office.

DEAR SIR: As Attorney for the Leavenworth, Pawnee and Western Rail Road Company of Kansas, I hereby make designation of the probable route of the road west of town of Lawrence in said State, to wit:

37 Commencing on the left bank of the Kansas river opposite said town, thence west along said left bank to the left bank of the Republican river, thence along said left bank of the Republican to the one hundredth meridian of longitude west from Greenwich.

2. Commencing on the left bank of the Kansas river opposite said town, thence west along said left bank to the left bank of the Solomon river, thence up said left bank of the Solomon to the mouth of Delaware Creek, thence in a straight line to the left bank of the Republican at said meridian of longitude.

I file herewith maps indicating said proposed routes.

I have to request that an order be issued withdrawing the land along both said routes from pre-emption, private entry and sale, in pursuance of the provisions of the 9th section of the "Act to aid in the construction of a railroad & telegraph line from the Missouri river to the Pacific Ocean," etc.—and as I am informed that large numbers of warrants have lately been sent to the land office at Junction City for location, I specially request that the order to that office be issued as early as possible.

If there be doubt as to the power to withdraw along more than one route, I suggest that the withdrawal be made at once along the route first above indicated, leaving the question as to the withdrawal of the land along the other route to be afterwards determined.

Very respectfully,

THOMAS EWING, JR.,
As Attorney for the Leavenworth, Pawnee and Western R. R. Co.

H. L. Stevens, Washington, July 4–1862.

As agent for the Leavenworth, Pawnee & Western, Rail Road makes designations of the probable Route of the Pacific Rail Road West of the town of Lawrence, in Kansas * * *.

See letter to R. & R. at Atchison and Topeka, Kansas, of July 17, '62—and to R. & R. Junction City, Kansas, and Brownsville, Nebraska T. of same date. Also letter to H. L. Stevens of July 18th, 1862.

Department of the Interior,

General Land Office.

Washington, D. C.,

May 12, 1917.

I hereby certify that the annexed copy of a letter dated July 18, 1862, from Commissioner, General Land Office, to H. L. Stevens, is a true and literal exemplification of the record thereof in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

C. M. BRUCE,
Assistant Commissioner of the General Land Office.

General Land Office.

July 18, 1862.

H. L. Stevens, Washington City, D. C.

SIR: I have the honor to acknowledge the receipt of the letter without date of Thos. Ewing, Jr., Esq., Attorney for the
38 Leavenworth, Pawnee and Western Rail Road Company of Kansas, and accompanying map and diagram designating the probable route of said road West of the town of Lawrence in said State, which were filed by you in this office on the 4th inst.

In reply I have to state that under the provisions of the 7th Section of the Act of Congress of July 1st, 1862, orders have been issued by this Office under date of the 17th inst. to the proper District Land Officers in Kansas and Nebraska for the withdrawal of all the public lands within fifteen miles on each side of said route from "preemption, private entry and sale." Misc. 11.

Very respectfully,
Your obt. servant,

J. M. EDMONDS,
Commissioner.

Department of the Interior,
General Land Office.

Washington, D. C.,
May 12, 1917.

I hereby certify that the annexed copies of letters dated July 17, 1862, addressed to Registers and Receivers at Topeka and Junction City, Kansas, are true and literal exemplifications of the records thereof in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

C. M. BRUCE,
Assistant Commissioner of the General Land Office.

General Land Office.

This letter was addressed to the Land Office at Topeka and Atchison, Kansas, respectively.

Rect. Acknowledged by Reg. July 29, '62, as having been received on the 28th.

July 17, 1862.

Register & Receiver, Topeka, Kansas.

GENTLEMEN: The Agent of the Leavenworth, Pawnee, and Western Railroad Company of Kansas having filed in this office a map,

and diagram, designating the probable route of said road West of the town of Lawrence in said State, from a point on the left bank of the Kansas river, opposite said town; thence West along the left bank of said river, to the left bank of the Republican Fork thereof, thence along the left bank of said Republican Fork to the one hundredth meridian of longitude West from Greenwich—Under the provisions of the Act of Congress entitled "An act to aid in the construction of a Railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes." Approved
39 July 1, 1862. You are hereby directed to withdraw from "pre-emption, private entry, and sale" all of the public lands situated in your district and lying within fifteen miles on each side of said route, as designated on the diagram herewith marked A—the townships and parts of townships thus withdrawn from sale or pre-emption being indicated thereon by a red color.

This order will take effect from the date of its reception at your office, and you will advise this office of the precise time it may be received by you.

Very respectfully,
Your obt. servant,

J. M. EDMONDS,
Commissioner.

NOTE.—The Register will carefully lay down the limits of the reservation in lead pencil on the township plats and make proper notes thereon, so that this order may be strictly observed, and the land be withheld from sale or entry of any kind.

J. M. EDMONDS, *Commissioner.*

General Land Office.

Rect. Acknowledged by R. & R. July 31, '62.

July 17, 1862.

Receiver and Register, Junction City, Kansas.

GENTLEMEN: The Agent of the "Leavenworth, Pawnee and Western Rail Road Company of Kansas" having filed in the office a map, and diagram, designating the probable route of said road, west of the town of Lawrence in said State, from a point on the left bank of the Kansas river, opposite said town; thence West along the left bank of said river to the left bank of the Republican Fork thereof; thence along the left bank of said Republican Fork to the one hundredth meridian of longitude West from Greenwich. Under the provisions of the Act of Congress entitled "An Act to aid in the construction of a Rail road and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes, Approved July 1, 1862." You are hereby directed to withhold from pre-emption, private entry and sale all of the public lands in your district and lying within fifteen miles on each side of said route as designated on the diagram

herewith marked (A)—The surveyed townships and parts of townships thus withdrawn from sale or pre-emption, being indicated by a red color.

Where said route passes through the surveyed lands, the Register will proceed at once to lay down in lead pencil, on the township plats the fifteen mile limits of the reserve on each side thereof; and make the proper notes thereon, showing that the lands embraced within said limits are reserved from sale or entry of any kind; and as the surveys progress westward along the Republican Fork, of the Kansas river, and the township plats are received, he will proceed in like manner to lay down the limits of the reservation and make similar notes thereon, and immediately report the same to this office,
40 so that this order may be strictly observed, by withholding the lands within said limits from sale or entry of any kind.

This order will take effect from the date of its reception at your office, and you will advise this office of the precise time it may be received by you.

Very respectfully,
Your obt. servt., J. M. EDMONDS, *Comm.*

At the trial the plaintiff introduced in evidence for the purpose of showing that a rule of property applicable to this case had been declared by the Supreme Court of Kansas, the decision of that court in the case of Geo. W. Veale, plaintiff in error, vs. Susan Maynes, defendant in error, reported in 23 Kansas, 1. The opinion is not set out here in full, but the syllabus of the Court is as follows:

Title to Indian Lands; Allotment; Patent. A certificate of allotment under the treaty of 1861 with the Pottawatomie Indians was issued to A., a member of the family of which B. was the head. Afterwards, and under the treaty of 1867, a patent to the same land was issued to B. Held, That the full title passed by said patent to B., and that his conveyance carried the same title, and free from all claims and equities in favor of A."

Filed in the District Court October 3, 1917.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto that the above case may be tried to the court at Kansas City, Kansas on Thursday, October 18th, 1917, at 10 o'clock A. M.

Dated Oct. 8, 1917.

R. W. BLAIR,
Atty. for Plaintiff.
41
Z. T. HAZEN,
J. B. LARIMER,
A. E. CRANE,
Attorneys for Defts.

Filed in the District Court October 8, 1917.

Order.

Now on this 18th day of October, 1917, a jury having been waived in writing, this cause came regularly on for trial before the court; the plaintiff appearing by R. W. Blair, its attorney; the defendants appearing by A. E. Crane, Z. T. Hazen and J. B. Larimer, their attorneys. The cause was submitted to the court upon a written, agreed statement of facts and other documentary evidence, and the court after considering the same and hearing the arguments of counsel, orders that the record of this cause be printed, the cost of the same to be taxed as costs in the case, and it further orders that the parties thereto file a printed brief, the brief of the plaintiff to be filed within ten days, and that of the defendants to be filed within ten days thereafter, the plaintiff having five days after receiving copy of defendants' brief in which to file a printed reply; and the further consideration of this cause is continued until this order is complied with.

O. K.
A. E. CRANE,
R. W. BLAIR.

Filed in the District Court October 18, 1917.

42 *Memoranda of Decision on Merits of Controversy.*

This suit is another of the many controversies which have arisen between the plaintiff, or its predecessors in title and right, over the width and extent of the right-of-way of plaintiff in this state, and the owners of property abutting upon said right-of-way. This case pertains to the width of the right-of-way through certain tracts of land owned by defendants lying within the Pottawatomie Indian Reservation, this state. Briefly stated, the facts out of which this controversy arises are, as follows:

The territorial legislature of this state in 1855 created a corporation named The Leavenworth, Pawnee and Western Railroad Company. (Laws of Kansas, 1855, page 915.) The plaintiff deraigns title to its right-of-way from said corporation and in the following manner.

By act of Congress July 1, 1862, the Union Pacific Railroad Company was created by Congress and was authorized to build a line of railroad from a point on the one hundredth meridian in the Territory of Nebraska to the western line of Nevada. For this pur-
43 pose the act granted said company so created, for the purpose of a right-of-way, two hundred feet in width on each side of the center line of its track over and across all public lands through which it was constructed. The purpose of the act of July 1, 1862, as expressed in its title, reads:

"An act to aid in the construction of railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the

government the use of the same for postal, military and other purposes."

Section 2 granted a right-of-way through the public lands two hundred feet in width. Section 7 provides for the acceptance of the terms and conditions of the act making the grant by the railroad company, and provides for the filing of maps, designation of routes and making a land grant in aid of the same. By section 9 it is provided:

"And be it further enacted that the Leavenworth, Pawnee & Western Railroad Company of Kansas are hereby authorized to construct a railroad and telegraph line from the Missouri river at the mouth of the Kansas River on the south side thereof so as to connect with the Pacific Railroad of Missouri, to the aforesaid point on the one hundredth meridian of longitude west from Greenwich as herein provided, upon the same terms and conditions in all respects as are provided in this act," etc.

Two days after the passage of this act the Leavenworth, Pawnee and Western Railroad Company did accept its terms and conditions in the manner provided by the act. And on July 4, 1862, filed a map as required by the provisions of section 7 of the act. It was accepted by the government and the public lands granted in aid of the building of the road were withdrawn from entry. In 1863 the Leavenworth, Pawnee and Western Railroad Company changed its name to that of Union Pacific Railway, Eastern Division, and in 1869 changed its name to The Kansas Pacific Railway Company, which company in turn was consolidated with the Union Pacific Railway in the year 1880. Again in 1898 all the property and franchise of said Union Pacific Railway Company by sale under foreclosure proceedings was acquired by and conveyed to plaintiff herein, and plaintiff and its predecessors in title and right have continually maintained a fence on each side of its track fifty feet from the center thereof through the Pottawatomie Reservation except at stations, which was the standard for fences along its entire line in Kansas. Defendants and their grantors have claimed to own and have used and cultivated and been in the actual possession of all the land outside of said fences since said railroad was constructed and have paid taxes thereon continually. The plaintiff and its predecessor have continually returned the right of way as a whole and have paid taxes assessed against it.

44

The road was constructed as contemplated by the parties to the satisfaction of the government by The Leavenworth, Pawnee & Western Railroad Company and its successors in name and right.

Defendants base their claim of title and right to possession of all the land in the tracts here in controversy outside of a right of way to the railway company one hundred feet in width from the following sources.

On June 6th and 17th, 1846, the government entered into a treaty with the Pottawatomie Tribe of Indians, which treaty was duly ratified on July 22, 1846. Article 4 of said treaty provides as follows:

"The United States agree to grant to the said United Tribes of Indians possession and title to a tract or parcel of land containing

576,000 acers, being 30 miles square, and being the eastern part of the lands ceded to the United States by the Kansas Tribe of
45 Indians, by treaty concluded on the 14th day of January and ratified on the 15th day of April of the present year, lying adjoining to the Shawnees on the south and the Delewares and Shawnees on the east, on both sides of the Kansas River, and to guarantee the full and complete possession of the same to the Pottawatomie Nations, parties to this treaty, as their land and home forever, for which they are to pay the United States the sum of $87,000 to be deducted from the gross sum promised to them in the third article of this treaty."

Thereafter, and on November 15, 1861, the government entered into a further treaty with the Pottawatomie Tribe of Indians which said treaty was duly ratified April 15, 1862. Article 2 of said treaty reads, as follows:

"Art. 2. It shall be the duty of the agent of the United States for said tribe to take an accurate census of all the members of the tribe, and to classify them in separate lists, showing the names, ages, and numbers of those desiring lands in severalty, and of those desiring lands in common, designating chiefs and head men, respectively; each adult choosing for himself or herself, and each head of a family for the minor childern of such family, and the agent for orphans and persons of unsound mind. And thereupon there shall be assigned, under the direction of the Commissioner of Indian Affairs, to each chief at the signing of the treaty, one section; to each head-man, one-half section; to each other head of a family one-quarter section; and to each other person eighty acres of land, to include, in every case, as far as practicable, to each family their improvements and reasonable portions of timber to be selected according to the legal subdivision of the survey. When such assignment shall have been completed, certificates shall be issued by the Commissioners of
46 Indian affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned, respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs. Until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee or leased or otherwise disposed of only to the United States, or to persons then being members of the Pottawatomie tribe and of Indian blood, with the permission of the President and under such regulations as the Secretary of the Interior shall provide, except as may be hereinafter provided. And on receipt of such certificates, the person to whom they are issued shall be deemed to have relinquished all right to any portion of the lands assigned to others in severalty, or to a portion of the tribe in common, and to proceeds of sale of the same whensoever made."

Article 5 of said treaty of 1861 reads, as follows:

"The Pottawatomies believing that the construction of the Leavenworth, Pawnee and Western Railroad from Leavenworth City to the western boundary of the former reserve of the Delawares is now rendered reasonably certain, and being desirous to have said railroad extended through their reserve, in the direction of Fort Riley, so that

the value of the lands retained by them may be enhanced, and the means afforded them of getting the surplus product of their farms to market, it is provided that the Leavenworth, Pawnee and Western Railroad Company shall have the privilege of buying the remainder of their lands within six months after the tracts herein otherwise disposed of shall have been selected and set apart, provided they purchase the whole of such surplus lands at the rate of $1.25 per acre.

"And if said company, make such purchase it shall be subject to the consideration following, to-wit: They shall construct and fully equip a good and sufficient railroad from Leavenworth City to a point half-way between the western boundary of the said former
47 Delaware reserve and the western boundary of the said Pottawatomie reserve, (being the first section of said road) within six years from the date of such purchase, and shall construct and fully equip such road from the said last named point to the western boundary of said Pottawatomie reserve (being the second section of said road), within three years from the date fixed for the completion of said section; and no patent or patents shall issue to said company or its assigns for any of said lands purchased until the first section of said railroad shall have been completed and equipped, and then for not more than half of said lands, and no patent or patents shall issue to said company or its assigns for any of the remaining portion of said lands until said second section of said railroad shall have been completed and equipped as aforesaid; and before any patents shall issue for any part of said lands payment shall be made for the lands to be patented at the rate of $1.25 per acre; and said company shall pay the whole amount of the purchase money for said lands in gold or silver coin, to the secretary of the Interior of the United States, in trust for said Pottawatomie Indians, within nine years from the date of such purchase, and shall also in like manner pay to the Secretary of the Interior of the United States, in trust as aforesaid, each and every year, until the whole purchase-money shall have been paid, interest from date of purchase, at six per cent per annum, on all the purchase money remaining unpaid.

"And the company shall have the perpetual right of way over the lands of the Pottawatomies not sold to it for the construction and operation of said railroad, not exceeding 100 feet in width, and the right to enter on said lands and take and use such gravel, stone, earth, water, and other material, except timber as may be necessary
48 for the construction and operation of said road, making compensation for any damages to improvements done in obtaining such material, and for any damages arising from the location or running of said road to improvements made before the road is located. Such damages and compensation, in cases where said company and the person whose improvements are injured or property taken cannot agree, to be ascertained and adjusted under the direction of the Commissioner of Indian Affairs."

Said treaty is found in its entirety 12 Statutes at Large, p. 1191.

Thereafter a roll of the Pottawatomie Tribe of Indians was prepared and allotments to the members of the tribe under the provisions of the treaty were made and approved by the Secretary of Interior

December 12, 1864. Thereafter patents to the allottees were issued by the government as contemplated by the treaty. The earliest of said patents bears date June 14, 1867. In the patents so issued to the allotted members of the tribe no reservation of a right of way to the road constructed over and across the reservation and the allotted lands therein was made. Defendants, Joseph Nedeau, and others, claim title thus deraigned under said treaty and patents to the allottees by mesne conveyances, the earliest of which bears date June 15, 1891.

The case stands submitted for decree on agreed facts and briefs and arguments of solicitors for the respective parties, and involves the question whether the plaintiff owns and is entitled to the possession and occupancy of a right of way four hundred feet in width over and across the lands of defendants in dispute, and over and across the Pottawatomie Indian reservation.

Very many of the contentions presented in this case by defendants were urged in the case of Kindred v. Union Pacific R. R. Co.,
49 225 U. S. page 582, in which case it was held the plaintiff railway company owned, is entitled to claim, occupy and possess a right of way over and across the Delaware Diminished Indian reservation, which reservation lies east of the Pottawatomie Indian reservation, four hundred feet in width, as granted to The Leavenworth, Pawnee & Western Railroad Company, by the same act of Congress under which the plaintiff here claims title, and under the precise terms and conditions save and except the difference in the language, terms, conditions and legal effect of the treaties made between the government, on the one hand, and the Pottawatomie tribe of Indians *in the one* and the Delaware tribe of Indians in the other.

The record in this case clearly discloses the Leavenworth Pawnee & Western Railroad Company, and its successors in title and right, constructed that part of the line over and across the Pottawatomie Indian reservation under and in compliance with the terms of the act of Congress of July 1, 1862, and amendments thereto, and that said railroad company did not accept the terms and conditions of the treaty between the government, on the one hand, and the Pottawatomie Indian tribe, on the other, of November, 1861. That it was the intent of the Congress in the passage of said act of July 1, 1862, to procure the construction and maintenance of a line of railway and telegraph from the Missouri River to the Pacific Coast, of which the sector now in dispute was made to form a part, as a great necessary military highway, will appear from the opinion prepared by Mr. Justice Davis for the court in the case of United States v. Union Pacific R. R. Co., 91 U. S. 72. While there is some controversy here attempted to be raised as to the strict compliance by the Leavenworth, Pawnee & Western Railroad Company with all the requirements of the government as expressed in the act of 1862, and as thereafter amended, as it was accepted by the railroad com-
50 pany, yet these are matters of which, in my judgment, the gover-ment alone can complain. The road was constructed by the railroad company and was accepted by the government as in full compliance of the act under which it was built, and without

opposition from the Pottawatomie tribe of Indians or any member of the tribe as an allottee of portions of that reservation. That by the act of July 1, 1862, the gover-ment solemnly determined and declared a right of way four hundred feet in width was necessary as a right of way for the road it desired constructed and was caused to be built under the terms of the act cannot be disputed. That under the terms of said act such right of way to the railroad company which accepted the terms of the act and constructed the road over and across the public lands of the country was granted in fee and in presenti is determined and settled by adjudications controlling here.

In such case the road could neither forfeit, alienate nor abandon said right of way, or any part of it, without the consent or in pursuance of future action thereon, by the Congress, at this date must be deemed conclusively settled, determined and ended. Therefore, the only new question presented on this record is this:

Were the lands comprised within the Pottawatomie Indian reservation at the date of the act of Congress making the grant, and the acceptance of its terms and provisions by the Leavenworth, Pawnee and Western Railroad Company, public lands of the United States of such nature and in such sense, under the terms of the treaty between the gover-ment and the Pottawatomie Indians by which their reservation was created, that the United States had the reserve power to make the grant of right of way claimed by plaintiff?

While it is true under the provisions of the act of July 1,
51 1862, the government obligated itself to proceed to the extinguishment of the Indian titles in lands granted as right of way to the railroad company which accepted the provisions of the act and constructed the road, and that the government did not so proceed, and said provision of the act has not been complied with, yet this must be held to be a matter between the Indian allottees in severalty of the tribe and the gover-ment, (Kindred v. Union Pacific R. R. Co., supra) Roberts v. Northern Pacific Railroad Company, 158 U. S. 1), and the failure to make such composition will not defeat the title of the railway company to its right of way across the reservation, as constructed, if the gover-ment had the power to make the grant of such lands to the road for right of way purposes when made.

Again, while as appears from the treaty between the government and the Pottawatomie Indians establishing the reservation and providing for its allotment to the members of the tribe in severalty, it was at the time contemplated by both parties thereto the Leavenworth & Pawnee Railroad Company would construct a line of road from the city of Leavenworth in this state to the west line of said reservation, and while for this purpose the road was to have a right of way across said reservation one hundred feet in width, and in consideration of the building of said line said company was to have the right to buy all the surplus lands of said tribe in said reservation after allotments made to members of the tribe, for the sum of one dollar and twenty-five cents per acre, yet this provision of the treaty was neither accepted nor acted upon by the Leavenworth, Pawnee &

Western Railroad Company. The road was not built and the road contemplated in this provision of the treaty was not to form a part of the gover-mental highway from the Missouri River to the Pacific coast, and therefore said provision of the treaty was in no manner or way binding upon the Leavenworth, Pawnee & Western
52 Railroad Company or its successors in title and right.

The controversy in the present case narrows itself to the single proposition: Did the government have the power to grant to the Leavenworth, Pawnee and Western Railroad Company, and its successors in right and title, a right of way four hundred feet in width over and across the Pottawatomie Indian reservation, as the title to that reservation stood at the date of the grant in furtherance of its contemplated military project in providing for a line of railway from the Missouri River to the Pacific coast?

That the government did by the act of July 1, 1861, and amendments thereto, attempt to make such a grant, believing it had the right to so do, is beyond question. That the railroad company accepted such grant and in good faith constructed the road to the satisfaction of the government, in reliance on the validity of the grant, must be conceded. That the government had the power to make a similar grant by the terms of said act to the railroad company, under similar conditions, across the Delaware Dimi-shed Indian reservation is now settled and concluded. Kindred v. Union Pacific R. R. Co., supra.

Is there anything in the provisions of the treaties of 1846 and 1861 between the government and the Pottawatomie Tribe of Indians which created the Pottawatomie Indian reservation and made provisions for its allotment in severalty to the members of the tribe by which the government was estopped and concluded from the making of the grant it did make to the Leavenworth, Pawnee & Western Railroad Company, and to make it effective and binding upon the allottees of said tribe, and their successors in title and right, at the time the grant was made? As has been seen, no patent from the government perfecting the title of any Indian allottee to his allotment in the Pottawatomie Indian reservation was issued prior
53 to June 14, 1867. As shown by the record in the case, the railway company had prior to the date of the issuance of the first patent to an allottee of any portion of the Pottawatomie Indian reservation constructed its line of road over and across the entire reservation and was operating the same. The record further shows by a treaty made by the government with the Pottawatomie Indians August 7, 1868, surplus lands in the Pottawatomie reservation were sold to the Atchison, Topeka and Santa Fe Railroad Company.

The question presented, therefore, is: Can the Indian allottees under the provision of the treaties between the government and the Pottawatomie Indian tribe of Indians who received their patents after the railroad had been constructed under the act of July 1, 1862, and amendments thereto made by Congress, or, the purchaser of the surplus lands in said reservation who received patent after the rights of the railway company had been fixed and established by the building of the road or those thereafter taking title to such al-

lotted lands by conveyance, question the validity of the grant of right of way to the railroad company?

An examination of the language of the treaty of 1846 will disclose not a grant of the lands in the reservation to the Pottawatomie tribe of Indians in fee or in presenti, but that the same constitutes merely an agreement on behalf of the government to grant in future to said tribe possession and title. All that was granted by said treaty or the succeeding treaty of November 15, 1861, was a right of possession and occupancy such as was usually given by the government to Indian tribes with the fee retained by and thereafter residing in the government until passed by patent to the individual allottee or purchaser of the surplus lands in accordance with the provisions of the treaty. That such was the true relation of
54 the Pottawatomie Indians to their lands contained in their reservation prior to patent is well settled by the adjudicated cases. The nature of the right of a Pottawatomie Indian allottee in his allotment made from the reservation of his tribe under the treaties in question prior to the patent issued in pursuance of said treaties was determined and clearly expressed by the Supreme Court of this state, Mr. Justice Brewer delivering the opinion, at a very early day. Also, by the Circuit Court for this District, Judges Dillon and Foster presiding. See, Veale v. Maynes, 23 Kan. 1; Grinter v. Kan. Pac. Ry. Co., 23 Kan. 655. As the treaties made between the United States and the Pottawatomie tribe of Indians conferred no present title on the tribe but merely the right of possession and occupancy by the tribe in common, reserving title in the government to be thereafter passed by patent issued, the government thereby reserved power of disposition over the lands of its wards, and complete power to make the grant in the act of July 1, 1862. See, United States v. Rowell, 243 U. S. 464. See, also Stuart v. U. P. R. R. Co., 227 U. S. 342; Kindred v. Union Pacific R. R. Co., supra.

It follows, as the grant to the railroad company of its rights of way over and across the Pottawatomie Indian reservation made in pursuance of the act of July 1, 1862, was a present grant in fee of a right of way four hundred feet in width to that company which should accept the terms and provisions of the act and construct the road; as Congress possessed the power to make such grant in such form to the Leavenworth, Pawnee and Western Railroad Company notwithstanding its prior treaties with the Pottawatomie tribe of Indians, and as defendants deraign their title from the Indian allottees or the purchasers of the surplus lands of said reservation after allotment made, and as the defendants derived their title from conveyances made more than a quarter of a cent-ry after the road
55 desired by the government to be built was constructed and in operation over and across said lands under the law of July 1, 1862, it follows, the prayer of Plaintiff must be granted, and it is accordingly so decreed. JOHN C. POLLOCK, *Judge*.

Kansas City, Kansas, February 21st, 1918.

Filed in the District Court February 21, 1918.

Journal Entry.

This cause coming regularly on for trial, a jury having been duly waived in writing, it was submitted to the court on an agreed statement of facts on October 18, 1917 and taken under advisement with leave given the parties to file printed briefs, and now on this day the court being fully advised finds that Union Pacific Railroad Company, plaintiff, is the legal successor of The Leavenworth, Pawnee & Western Railroad Company, which last named company was granted a right of way four hundred (400) feet wide across the lands described in the petition herein by the act of Congress of July 1, 1862, and that Union Pacific Railroad Company, plaintiff, is entitled to the immediate and exclusive possession of said right of way four hundred (400) feet wide through said premises, being two hundred (200) feet wide on each side of its track, and more particularly described as follows:

A strip of land two hundred (200) feet wide parallel with and immediately north of the center line of the railroad track of Union Pacific Railroad Company as the same is located across the southwest quarter of the northwest quarter of section thirteen (13)
56 township ten (10), range twelve (12).

A strip of land two hundred (200) feet wide parallel with and immediately north of the center line of the railroad track of Union Pacific Railroad Company as the same is located across the northeast quarter of the southwest quarter of section thirteen (13) township ten (10), range twelve (12).

A strip of land two hundred (200) feet wide parallel with and immediately south of the center line of the railroad track of Union Pacific Railroad Company as the same is located across the northeast quarter of the southwest quarter of section thirteen (13) township ten (10) range twelve (12).

A strip of land two hundred (200) feet wide parallel with and on each side of the center line of the railroad track of Union Pacific Railroad Company as the same is located across the southeast quarter of section thirteen (13), township ten (10) range twelve (12) being two hundred (200) feet on each side of the track.

A strip of land two hundred (200) feet wide parallel with and on each side of the center line of the railroad track of Union Pacific Railroad Company as the same is located across the northeast quarter of section twenty-four (24) township ten (10) range twelve (12) being two hundred (200) feet on each side of the track.

A strip of land two hundred (200) feet wide parallel with and immediately south of the center line of the railroad track of Union Pacific Railroad Company as the same is located across the west half of the southwest quarter of section nine (9) township eleven (11) range fourteen (14).

A strip of land two hundred (200) feet wide parallel with and immediately south of the center line of the railroad track of Union Pacific Railroad Company as the same is located across the east half

of the southeast quarter of section eight (8), township eleven (11) range fourteen (14).

57 All of which lands are situate in Shawnee County, Kansas.

It is further ordered, adjudged and decreed that Union Pacific Railroad Company, plaintiff, is the owner and is entitled to the immediate and exclusive possession of all the above described real estate, and that the defendants, Joseph E. Nedeau, Martha Nedeau, his wife, George Huntsman and James I. Anderson, and all persons claiming through or under them, be and they are hereby barred from any title to, interest in, or right of possession of any part of the above described real estate, and it is further ordered, adjudged and decreed that the plaintiff have judgment against said defendants for its costs herein, taxed at $—, for which let execution issue.

To which judgment and all parts thereof the defendants duly excepted and asks and *is* granted ninety days from this date in which to prepare and file their Bill of Exceptions.

Entered this 28th day of February, 1918.

JOHN C. POLLOCK, *Judge.*

Filed in the District Court on February 28th, 1918.

Motion for a New Trial.

Come now the above named defendants and move the court to set aside the findings and judgment of the court rendered herein on the 21st day of February, 1918, and to grant to the defendants a new trial of the above entitled action for each and all of the following reasons.

1. Because of erroneous rulings of the court.
2. Because the decision, findings and judgment of the court are contrary to the evidence and to the admitted facts in the case.

A. E. CRANE,
J. B. LARIMER,
Z. T. HAZEN,
Attorneys for Defendants.

Filed in the District Court on February 26th, 1918.

58 *Order Overruling Motion for a New Trial.*

Now on this 5th day of March, 1918, comes on for hearing the motion of the defendants for a new trial of the above entitled action, and the court having considered said motion and being fully advised in the premises doth overrule and deny said motion to which ruling and decisions of the Court, defendants except and ninety days is given them within which to prepare, have allowed and file a Bill of Exceptions.

JOHN C. POLLOCK, *Judge.*

O. K.
R. W. BLAIR, *Atty. for Plff.*

Filed in the District Court on March 5th, 1918.

59 *Bill of Exceptions.*

Be it remembered, that on the trial of this cause in the district court of the United States for the district of Kansas, First Division, before the Honorable John C. Pollock, United States District Judge for the District of Kansas, on the 18 day of October, 1917, a jury having been duly waived by the parties, the cause was tried upon an agreed statement of facts, which agreed statement of facts was offered in evidence by consent of all parties and is in the words and figures following, to-wit:

Agreed Statement of Facts.

(Omitted, original appearing on page 14.)

60 Thereupon the plaintiff introduced in evidence the decision of the Supreme Court of the State of Kansas, in the case of George W. Veale, plaintiff in error, vs. Susan Maynes, defendant in error, reported in the 23rd Kansas, at page one, which opinion is in words and figures following, to-wit:

61 "BREWER, *J.*:

This is an action in the nature of ejectment, brought by the defendant in error against the plaintiffs in error, to recover possession of a tract of land which she claims by virtue of an allotment to her under the Pottawatomie treaty of 1861. 12 St. at Large, 1191. The plaintiffs claim under the patentee, Anthony F. Navarre, who, as head of the family of which defendant in error was a member, received the patent for the land in controversy as provided by section 6 of the treaty of 1867. 15 St. at Large, 536. The case was tried by the court without a jury, and the findings of law and fact are embodied in the record. The certificate of allotment for the land in question, issued to the defendant in error, and the patent to Anthony F. Navarre as head of the family, are both recited in full in the findings of fact. The conclusions of law were as follows:

"(1) That the said treaty of November 15, 1861, and the action had thereunder, including the issuance of the said certificate by the commissioner of Indian affairs, operated as and constituted a grant of the land in controversy to said Susan Letranch, (now Susan Maynes, plaintiff;) to which conclusion of law the said defendants then and there excepted. (2) That the said treaty of February, 1867, did not authorize the issuance of the patent to said Anthony F. Navarre; to which conclusion of law the said defendants then and there excepted. (3) That said patent, so issued on the sixteenth day of May, 1870, to said Anthony F. Navarre, is null and void; to which conclusion of law the said defendants then and there excepted. (4) That the said plaintiff, at the time of the commencement of this action, was and now is the owner of said land and premises in her

petition described, and entitled to the immediate and exclusive possession thereof, to which conclusion of law the defendants then and there excepted."

The defendants, being in possession and holding under a patent from the United States, were entitled to judgment unless a better title in the plaintiff was shown; and that better title of necessity implied, not simply an irregularity in the issue of the patent, for that would be a matter between the government and the patentee,—but a want of title in the government, or, at least, of a right to convey at the time it issued the patent. In other words, it implied the
62 invalidity of the patent because of a prior vesting of either the legal or equitable title in the plaintiff. To determine this question, it becomes necessary to examine the treaties between the government and the Pottawatomie Indians of 1846, 1861, and 1867. By them must be determined the extent of the interest vested in the allottee, and the power by treaty between the Indians and the government, to thereafter locate the legal title to the tract covered by the allotment. We quote the various sections which are claimed by counsel to affect this question, premising the quotations by saying that certain rules of construction seem to have become settled concerning Indian treaties and titles, and that the language of the various sections must be construed in the light of these established rules. The treaty of 1846 (9 St. U. S. 853) provided for concentrating the various bands of the Pottawatomie Indians into one nation, to be known as the Pottawatomie nation, their cession of all lands owned or claimed by them, in consideration of $850,000, to be used or invested as further specified in the treaty. Section 4 then reads:

"The United States agree to grant to the said united tribes of Indians possession and title to a tract or parcel of land containing, * * * and to guaranty the full and complete possession of the same to the Pottawatomie nation, parties to this treaty, as their land and home forever; for which they are to pay the United States the sum of $87,000, to be deducted from the gross sum promised to them in the third article of this treaty."

No other provision*x* of this treaty seem to t*rh*ow any light on the question. The treaty of 1861, proclaimed April 19, 1862, (12 St. U. S. 1191,) is the next in order, and contains these sections:

"Article 1. The Pottawatomie tribe of Indians, believing that it will contribute to the civilization of their people to dispose of a portion of their present reservation in Kansas, consisting of five hundred and seventy-six thousand acres, which was acquired by them for the sum of $87,000, by the fourth article of the treaty between the United States and the said Pottawatomies, proclaimed by the president of the United States on the twenty third day of July, 1846, and to allot lands in severalty to those of said tribe who have
63 adopted the customs of *of* the whites, and desire to have separate tracts assigned to them, and to assign a portion of said reserve to those of the tribe who prefer to hold their lands in common,—it is therefore agreed by the parties hereto that the commissioner of Indian affairs shall cause the whole of said reservation

to be surveyed in the same manner as the public lands are surveyed, the expense whereof shall be paid out of the sales of lands hereinafter provided for, and the quantity of land hereinafter provided to be set apart to those of the tribe who desire to take their land in severalty, and the quantity hereinafter provided to be set apart for the rest of the tribe in common; and the remainder of the land, after especial reservations hereinafter provided for shall have been made, to be sold for the benefit of said tribe.

"Art. 2. It shall be the duty of the agent of the United States for said tribe to take an accurate census of all members of the tribe, and to classify them in separate lists, showing the names, ages, and numbers of those desiring land in severalty, and of those desiring lands in common, designating chiefs and head-men respectively, each adult choosing for himself or herself and each head of a family for the minor children of such family, and the agent for orphans and persons of an unsound mind. And thereupon there shall be assigned, under the direction of the commissioner of Indian affairs, to each chief at the signing of the treaty, one section; to each head-man, one half section; to each other head of a family, one quarter section; and to each other person, eighty acres of land; to include in every case, as far as practicable, to each family, their improvements and a reasonable portion of timber, to be selected according to the legal subdivision of survey. When such assignment shall have been completed, certificates shall be issued by the commissioner of Indian affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs. Until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee, or leased, or otherwise disposed of only to the United States, or to persons then being members of the Pottawatomie tribe, and of Indian blood, with the permission of the president, and under such regulations as the secretary of the interior shall provide, except as may be hereinafter provided. And, on receipt of such certificates, the person to whom they are issued shall be deemed to have relinquished all right to any portion of the lands assigned to others in severalty, or to a portion of the tribe in common, and to the proceeds of sale of the same whensoever made.

"Art. 3. At any time hereafter, when the president of the United States shall have become satisfied that any adults, being males and heads of families, who may be allottees under the provisions of the foregoing article, are sufficiently intelligent and prudent to control their affairs and interests, he may, at the request of such persons, cause their lands severally held by them to be conveyed to them by patent in fee simple, with power of alienation, and may, at the same time, cause to be paid to them in cash or in the bonds of the United States their proportion of the cash value of the credits of the tribe, principal and interest, then held in trust by the United States, and also as the same may be received, their proportion of the proceeds of the sale of lands under the provisions of this treaty; and, on such

patents being issued and such payments ordered to be made by the president, such competent persons shall cease to be members of said tribe, and shall become citizens of the United States; and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens: pro-
64 vided that, before making any such application to the president, they shall appear in open court in the district court of the United States for the District of Kansas, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and shall also make proof to the satisfaction of said court that they are sufficiently intelligent and prudent to control their affairs and interests; that they have adopted the habits of civilized life, and have been able to support, for at least five years, themselves and families.

"Art. 4. To those members of said tribe who desire to hold their *h*ands in common, there shall be set apart an undivided quantity, sufficient to allow one section to each chief, one half section to each head-man, and one hundred and sixty acres to each other head of a *f*amily; and eighty acres of land to each other person; and said land shall be held by that portion of the tribe for whom it is set apart, by the same tenure as the whole reserve has been held by all of said tribe under the treaty of 1846. And upon such land being assigned in common, the persons to whom it is assigned shall be held to have relinquished all title to the lands assigned in severalty, and in the proceeds of sales thereof whenever made."

The treaty of 1867, proclaimed August 7, 1868, (15 St. U. S. 531,) provides for securing a home for the Pottawatomies in the Indian country, and the removal thither of such as desire to be removed. The first, second, and third sections relate to the selection, payment, etc., of the new reservation. The fourth, sixth, and eighth sections, so far as they bear upon the question, are as follows:

"Sec. 4. A register shall be made under the direction of the agent and the business committee of the tribe, within two years after the ratification of this treaty, which shall show the names of all members of the tribe who declare their desire to remove to the new reservation, and of all who desire to remain and become citizens of the United States; and after the filing of such register in the office of the commissioner of Indian affairs, all existing restrictions shall be removed from the sale and alienation of lands by adults who shall have declared their intention to remove to the new reservation; but provided, that no person shall be allowed to receive to his own use the avails of the sale of his land, unless he shall have received the certificate of the agent and business committee that he is fully competent to manage his own affairs; nor shall any person also be allowed to sell and receive the proceeds of the sale of the lands belonging to his family, unless the certificate of the agent and business committee shall declare him competent to take the charge of their property; but such persons may negotiate for the sales of their property, and that of their families; and any contracts for sales so made, if certified by the agent and business committee to be at reasonable rates, shall be confirmed by the secretary of the interior, and patents

shall issue to the purchaser upon full payment, and all payments for such land shall be made to the agent," etc.

65 "Sec. 6. The provisions of article 3 of the treaty of April 19, 1862, relative to Pottawatomies who desire to become citizens, shall continue in force, with the additional provision that, before patents shall issue and full payments be made to such persons, a certificate shall be necessary from the agent and business committee that the applicant is competent to manage his own affairs; and when computation is made to ascertain the amount of the funds to the tribe to which such applicants are entitled, the amounts invested in the new reservation provided for in the treaty shall not be taken into account. When any member of the tribe shall become a citizen, under the provisions of said treaty of 1862, the families of said parties shall also be considered as citizens, and the head of the family shall be entitled to patents and the proportional share of funds belonging to his family; and women who are also heads of families, and single women of adult age, may become citizens in the same manner as males."

"Sec. 8. (as amended.) Where allottees under the treaty of 1861 shall have died, or shall hereafter decease, such allottees shall be regarded, for the purpose of a careful and just settlement of their estates, as citizens of the United States and of the state of Kansas; and it shall be competent for the proper courts to take charge of the settlement of their estates, under all the forms and in accordance with the laws of the state, as in the case of other citizens deceased. And in cases where there are children of allottees left orphans, guardians for such orphans may be appointed by the probate court of the county in which such orphans may reside; and such guardians shall give bonds, to be approved by the said court, for the proper care of the person and estate of such orphans, as provided by law."

The starting-point is, of course, the treaty of 1846. By that the first cession of this land was made to the Pottawatomies, and it is claimed that by it something more than the ordinary Indian title was granted to the nation. Stress is laid upon the words "possession and title," and the use of the latter, it is said, implies something more than the mere right of occupancy, for that would pass under the former word. It may be that those words in the language of a grant to a corporation or citizen would imply the grant of the title of the grantor. A contract between individuals to convey title might mean full title. But these words in the treaty must be construed in the light of the recognized relations between the government and the Indians, and the established policy of the former towards the latter. Title does not necessarily mean title in fee-simple; it may mean any kind of title, even the mere title by occupancy. The Indian title has been constantly recognized

66 as simply this inferior title. The government has uniformly asserted its holding of the fee, and has recognized the Indian right as only one of possession. The supreme court reports are full of this doctrine.

In Doe v. Wilson, 23 How. 463, the court uses this language:

"The United States held the ultimate title, charged with the right

of undisturbed occupancy and perpetual possession in the Indian nation, with the exclusive power in the government of acquiring that right."

See, also, Johnson v. McIntosh, 8 Wheat. 603. As recently as 1877, the supreme court, in the case of Beecher v. Wetherby, 95 U. S. 525, has reasserted the doctrine that the Indian right to land is a mere possessory one, and yet the land in question was described as "owned and occupied by the Menominee Indians," and it was "set apart" for their future homes. So, in the case of U. S. v. Cook, 19 Wall. 591, the chief justice, delivering the opinion of the court, said:

"The right of the Indians in the land from which the logs were taken, was that of occupancy alone. They had no power of alienation, except to the United States. The fee was in the United States, subject only to this right of occupancy. This is the title by which other Indians hold their lands. The right of the Indians to their occupancy is as sacred as that of the United States to their fee; but it is only a right of occupancy."

Take the Osage reservation, which was set apart for that tribe by most solemn words of perpetual ownership. The supreme court said, in Leavenworth, L. & G. R. Co. v. U. S., 92 U. S. 733, "That, in the free exercise of their choice, they might hold it forever;" but they could only hold it. The fee was in the United States, subject to the right of the Indians. Now, that the government had power to depart from this traditionary policy, and vest the fee, as well as the right of occupancy, in the Indians, is unquestioned; but, if a departure had been intended, words more apt and clear would undoubtedly have been used. There is nothing in the balance
67 of the treaty to distinguish it from ordinary Indian treaties. The tribal existence was fully recognized. No provision was in it for changing the relations of the tribe to the government, or for naturalizing the individual Indian. There is no restriction on the power of alienation, and no reservation to the government of the sole or prior right of purchase. So that, if the fee passed, the tribe could the next day have conveyed full title to an individual, or to any other purchaser, even a foreign nation. More than that, the further language of the section indicates the extent of the intended grant. It is "to guaranty the full and complete possession * * * as their land and home forever." But if the fee was granted, the courts would always protect the title. Possession was guaranteed to the Indians, and not to them and their grantee. In short, there is nothing in or about the treaty to indicate that any other right or title was granted than that "by which other Indians hold their land," and that is the right or title of occupancy.

With this understanding, then, of the import of this treaty, we pass on to consider the subsequent treaties. Chronologically, the treaty of 1861 next demands attention. This treaty is a departure. It was a movement towards the disintegration of the tribe, and the absorption of the individual Indians into the body of American citizens. No universal or abrupt change was contemplated; and such limitations and checks were placed as it was thought would suffi-

ciently protect these wards of the nation from the schemes of the designing. In carrying out this obvious purpose, three steps were prescribed: The division of property; the conveyance of title; and the naturalization of the person. When these were accomplished, the individual passed out from tribal control, and became an American citizen, with separate and absolute property. Yet, by the
68 terms of the treaty, (article 3), all this was possible only for the adult male heads of families. All others, ex necessitate, remained within the tribe, bound by its laws and concluded by its treaties, notwithstanding a certain holding of lands in severalty was possible for any and all. The treaty provided for a survey of all the lands and a census of the entire tribe, and then that certain quantities of land be assigned in severalty to those who desire thus to hold, and in common to the remainder. Now, what was intended by this division—that the title be thus divided up, or the mere matter of occupancy? Of course, either was within the power of the contracting parties. They might provide for a division among the several Indians, which should vest an absolute title in each, beyond the power of the tribe or the government to disturb without the personal consent of the individual; or they might provide for an individualizing of the right of occupancy, giving to each person a sole right of occupancy in a particular tract, a right guarantied against invasion by any individual, but still within the power of the tribe, as a tribe, to convey by treaty. In other words, while that remained the tribal home, each individual desiring it should have separate control of certain lands, yet subject to the ultimate power of the tribe to change their home and to make absolute conveyance of the whole body of lands. The power of the tribe, as a tribe, remained undisturbed over both the allotted lands and those held in common. That this was the intent and effect of the treaty, we are constrained to hold; and this notwithstanding many expressions which, if used in ordinary contracts between individuals, would have marked significance to the contrary.

The allottee remained a member of the tribe. We are not advised by any thing in the record as to the extent of the power of
69 the tribe over the individual; but whatever that power was, it remained in full vigor over the allottee. There was no separation of the allottee from the nation, and no express restriction upon the power of the tribal authorities to act for him as fully as for any other member of the tribe.

And that which thereafter the tribal authorities assumed to do for him, may well be assumed, in the absence of proof of limitations upon their power, to be within the scope of that power as recognized by the laws and customs of the nation. It must be remembered that, in a large sense, an Indian tribe is to be considered as a foreign nation, and its laws and customs matter of proof, and not to be judicially taken notice of. The powers of the supreme authority differ in different nations; and an act of such Supreme authority of a foreign nation should not be presumed to be beyond its powers, simply because such an act would be beyond the powers of the supreme authority of our own nation. The full force of this argument

will become more apparent when we consider the subsequent treaty of 1867. At present it is enough to notice that the allottee remained a member of the tribe; and if the intention had been to enlarge his title from the ordinary Indian title—one of occupancy—to that of a fee-simple, the intention would, it seems, have been expressed in unmistakable terms. If, on the other hand, a difference was to be made in the mere manner in which the various Indians occupied the tribal home, it was enough that that difference was made clear, and language used to indicate that should not be carried to some further meaning.

If it be said that the allotted tracts were set apart for the pereptual and exclusive use and benefit of the several allottees, and that each allottee relinquished all interest in other allotments as well as in the lands held in common, we reply that these words are no stronger than those which have frequently been used to vest title in
70 an Indian tribe; no stronger than those used in the treaty of 1846 with this same tribe, which we have heretofore noticed. So far as the exclusive benefit is concerned, it was the proffer of an inducement to the allottee to improve his land, in the hope that this incentive would tend towards habits of industry, and, consequently, civilization. To perfect the guaranty of exclusive benefit, exclusive possession while tribal occupancy remained, and receipt of full proceeds of the sale of the separate tract when it was sold, were sufficient. To them no title need be added, or, at least, none greater than the ordinary Indian title of exclusive occupancy.

Again the treaty provided in the third article for the conveyance of title. This was made only to those who left the tribe and became citizens. Upon their naturalization, a title in fee-simple, with power of alienation, was conveyed, and at the same time their proportion of the personal property of the tribe was transferred. At this time appears the complete separation and individualization. Prior thereto their interest in the lands and personalty was tribal; thenceforward personal. The fact that this provision here appears, tends to support the claim that before this nothing was intended save a separate occupancy, with the benefit of all improvements personally made. We might notice other matters in the treaty tending in the same direction; but the foregoing are sufficient. This same question has recently been before Judge Foster of the United States court, and his opinion, concurred in by Judge Dillon, very clearly and forcibly expresses the same conclusion. We quote his language:

"It has been uniformly held by the supreme court that the Indian title was but a right of occupancy, the fee remaining in the United States, (U. S. v. Cook, 19 Wall. 592; Johnson v. McIntosh, 8 Wheat.
574; Worchester v. Georgia, 6 Pet. 580; Fletcher v. Peck, 6
71 Cranch, 142; 1 Kent. Comm. 259); and unless there is a clear and explicit provision in the treaty, showing that the government intended to make a grant in fee-simple, the court will not presume a new departure has been made or that a different policy from that pursued in the past was intended. Now, there is but little in this treaty to justify the court in finding a grant made, or intended to be made, to the allottees. It was undoubtedly the desire of the

gover-ment to induce the Indians to adopt the modes and habits of civilized life whenever it could be accomplished, and, as a step in that direction, the plan of allotment in severalty to those of the tribe who had adopted the customs of the whites, and were willing to abandom all claims to the common lands and funds, was adopted. It was optional with the adult Indian to have his land in common with the tribe, or to have it allotted to him in severalty; the head of the family choosing for the minor children, and the agent for orphans and those of unsound mind. It further provides that certificates shall issue to the allottees for the tracts assigned in severalty, specifying the individuals to whom they had been assigned respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of said assignees and their heirs. The allotted lands were exempt from taxation and sale and were not alienable by the allottee. That the contracting parties to this treaty did not regard the fee as becoming vested in the allottee by virtue of article 2, and the certificate issued in pursuance thereof, is demonstrated by the next article; for it is therein provided how the adult allottee may obtain that title. It provides, in substance, that when he should make it appear to the United States district court that he had adopted the habits of civilized life and that he was sufficiently intelligent and prudent to control his own affairs, and take the oath of allegiance, etc., he could then apply to the president of the United States for a patent, and the president, on being satisfied that he was competent to control his own affairs, might cause the lands to be conveyed to him by patent in fee-simply, with power of alienation; and when the patent was made and the fund distributed, the patentee became a citizen of the United States, and ceased to be a member of the tribe, and the lands were subject to taxation, sale, etc. That the contracting parties anticipated that these allotments would ultimately ripen into perfect titles through the proceedings specified in article 3, is altogether probable. But that event might or might not happen.

Passing now to the treaty of 1867, we find that it is between the same contracting parties as that of 1861. Where contracts are entered into between parties, the construction put by the parties themselves in the latter contract upon the provisions of the earlier, is strong evidence of their real scope and effect. Without doubt, as we have seen, there is obscurity in the treaty of 1861. Now within six years the same parties enter into a *a* further treaty con-
72 cerning the same subject-matter. In so far as in this they put any interpretation upon the provisions of that, it is entitled to great weight. Indeed, except so far as adverse and vested rights are concerned, it might fairly be said to be controlling. And, first, it may be noticed that the treaty is with the tribe as a tribe, and concerning the allotted lands as well as those held in common. Notwithstanding the treaty of 1861 had specified that the several allottees should be "deemed to have relinquished all right to any portion of the lands assigned to others in severalty or to a portion of the tribe in common," yet the dealings in 1867 are not separately with each allottee for his tract, and with those holding in common for their body of land, but with the tribe as a whole, and for all

the lands. The very manner of thus dealing shows that the parties thereto did not understand that the treaty of 1861 placed the allotted lands, any more than the allottees themselves, outside the *the* limits of tribal control. If the legal title, or even a full equitable title, was vested by the allotment in the allottee, then, by our laws at least, no divesting of that title save by the personal assent of the allottee was possible; and any contract therefor would have to be made with each allottee personally. Now, without noticing all the various provisions indicating an assumed tribal control, it is enough to refer to article 7, which authorizes, in certain cases, and after the lapse of five years, a peremptory sale and removal to the new reservation. It is true, there is a privision for securing to each allottee the benefits of the sale of his allotment; but this is simply carrying out the intent foreshadowed in the treaty of 1861, and heretofore noticed in this opinion, of encouraging each Indian to the improvement of his
73 separate tract by the assurance that the full benefit of his labor and those improvements should inure to himself. Again, article 6 specifically provides that the "head of the family shall be entitled to patents and the propertional share of funds belonging to his family." This is an express provision, and the clearest assertion of the understanding of the parties of the scope and import of their contract in 1861. It is also an assertion of tribal power which, as already suggested, must be assumed to be within such power as recognized by established laws and customs of the tribe. Counsel would have us interpret these words as meaning simply that the head of the family should be entitled to the custody of the patents issued to the allottee members of his family. But this does violence to the language. The mere custody of the evidence of title would scarcely be dignified with a separate provision in the treaty, and if that were in fact intended, words more apt would assuredly have been used. Clearly, the money and the lands which, under the division, would be or had been assigned to the minor members of his family, were to go directly to him. As head of the family, he represented it, and to him the treaty intended should pass whatever was the family share of the tribal property.

In further support of these views, it may be noticed that the action of the ministerial officers of the gover-ment has been in the line of his construction of the treaty, and that, so far as appears, without objection from the tribe. Again, in 1869, an attempt was made by congress to withhold from the head of the family the minors' share of the tribal funds, (16 St. at Large, 29); but this act was repealed in 1870 (16 St. at Large, 370), as in conflict with the prior treaties. In other words, when the attention of congress was called to the matter, it recognized the fact that by treaty the head of the family
was entitled to such funds. If entitled to the funds, why not
74 also to the lands?

Our conclusion, then, is that the treaty of 1867 authorized a patent in fee-simple to the head of the family of lands prior thereto allotted to the members of his family, and that such provision was not invalidated by any prior treaties or in derogation of any vested rights.

The judgment of the district court will therefore be reversed, and the case remanded, with instructions to render judgment on the findings in favor of plaintiffs in error, defendants below.

It is understood that the same question controls the case of Taylor v. Wilbers; and the judgment in that case will be affirmed.

(All the justices concurring.")

75 The foregoing is all of the evidence introduced on the trial for consideration by the court in the hearing of the cause.

Thereupon the court took the cause under advisement and thereafter on the 21st day of February, 1918, the court rendered a memorandum decision, which memorandum decision is in words and figures following, to-wit:

Memoranda of Decision on Merits of Controversy.

(Omitted, copy of original appearing on page 42.)

76 To which memorandum decision and to each and every part thereof, the defendants, and each of them, separately at the time objected and excepted, for the reason that said decision is contrary to the law and evidence and also for the further reason that said memorandum decision denied any force or effect to the treaties of the United States with the Pottawatomie Tribe of Indians, one made on the 5th and 17th of June, 1846, and the other dated November 15, 1861, and ratified by the United States Senate on April 15, 1862.

Thereupon the court rendered judgment in favor of the plaintiff and against each and all of the defendants, to which judgment so rendered by the court and to each and every part thereof, the defendants and each of them at the time objected and excepted, for the reason that said judgment and decision was contrary to the law and evidence and gave no force or effect to the aforesaid treaties between the United States and the Pottawatomie Tribe of Indians.

Thereupon the defendants duly filed their motion for a new trial, which motion for a new trial is in words and figures following, to-wit:

Motion for a New Trial.

(Omitted, copy of original appearing on page 57.)

Order Overruling Motion for a New Trial.

(Omitted, copy of original appearing on page 58.)

77 Which motion was thereupon considered by the court and was thereafter on the 5th day of March, 1918, by the court overruled and denied, to which ruling of the court the defendants and each of them at the time duly objected and excepted.

The defendants present the foregoing as a full, true and complete Bill of Exceptions in the therein entitled cause, and ask that the same

be settled, allowed and signed by the court as such and that it be ordered filed by the clerk of this court and made a part of the record in this case.

Z. T. HAZEN,
J. B. LARIMER,
A. E. CRANE,
Attorneys for Defendants.

78 To the plaintiff, Union Pacific Railroad Company, and to R. W. Blair, T. M. Lillard, and A. M. Hambleton, its attorneys of record:

You and each of you are hereby notified that the foregoing is prepared and tendered to you as a full, true and complete bill of exception in the therein entitled cause, and that the same will be presented to the Honorable John C. Pollock, United States District Judge, at his Chambers in Kansas City, Kansas, on the 13 day of April, 1918, for his consideration and allowance.

Z. T. HAZEN,
J. B. LARIMER,
A. E. CRANE,
Attorneys for Defendants.

We hereby asknowledge service of the *bill of the* foregoing bill of exceptions this 13 day of April, 1918.

R. W. BLAIR,
T. M. LILLARD,
A. M. HAMBLETON,
Attorneys for Plaintiff.

We have examined the foregoing bill of exception and find the same in all respects a true and complete bill of exception and consent that the same may be presented to and allowed by the Judge of the court as such without further notice to or appearance by us.

R. W. BLAIR,
T. M. LILLARD,
A. M. HAMBLETON,
Attorneys for Plaintiff.

79 The foregoing bill of exceptions is on this 13 day of April 1918, presented by the defendants as and for their Bill of Exceptions, and the same having been duly served upon the plaintiff and found by it to be true and correct and said plaintiff having waived further notice of time and place of settlement and allowance thereof and said Bill of Exceptions having been examined by the court and found to be in all respects true, full and complete is by the court here allowed, signed and sealed as a true, full and complete Bill of Exceptions and is ordered to be filed by the clerk of this court and to become and be a part of the record in this cause.

JOHN C. POLLOCK, *Judge.*

Filed in District Court April 13, 1918.

Assignment of Errors.

And now come the plaintiffs in error by A. E. Crane, Z. T. Hazen and J. B. Larimer, and in connection with their petition for a writ of error say that in the record, proceedings and in the final judgment and the order overruling the motion for a new trial aforesaid manifest error has intervened to the prejudice of the plaintiffs in error, to-wit:

1. The said district court of Kansas, erred in rendering said memorandum decision for the reason that said memorandum decision is contrary to the law and the admitted facts.

2. The said district court erred in holding and deciding that
80 congress had the power to grant a right of way for the defendant railroad across the lands in question in contravention of the two treaties between the United States and the Pottawatomie Tribe of Indians.

3. The said district court of Kansas erred in rendering judgment in favor of the defendant in error, the Union Pacific Railroad Company, and against the plaintiffs in error, in this cause for the reason that the judgment rendered by the court is contrary to the law and the admitted facts, and also for the further reason the judgment gave no force or effect to the two treaties between the United States and the Pottawatomie Tribe of Indians, one dated June 17, 1846, and the other ratified by the Senate of the United States on April 22, 1862.

4. The said district court of Kansas erred in overruling the motion for a new trial of the plaintiffs in error for the reason that said court having erred as matter of law in rendering its memorandum decision and rendering judgment against the plaintiffs in error and for costs.

To which errors these defendants, plaintiffs in error herein pray that the judgment in this cause of the United States district court of the State of Kansas, be reversed in favor of the plaintiffs in error and for costs.

A. E. CRANE,
Z. T. HAZEN,
J. B. LARIMER,
Attorneys for Plaintiffs in Error.

Filed in the District Court on April 13, 1918.

Petition for a Writ of Error.

To the Honorable John C. Pollock, judge of said court:

And now come the plaintiffs in error being the defendants in this action by their attorneys, A. E. Crane, Z. T. Hazen and J. B.
81 Larimer and feeling aggrieved by the final judgment of this court entered against them and in favor of the defendant in error, Union Pacific Railroad Company, on the — day of February, 1918, hereby pray that a writ of error may be allowed to them

from the Supreme Court of the United States to the District Court of the United States for the District of Kansas, and in connection with this petition, petitioners herewith present their assignment of errors.

Petitioners further pray that an order of supersedeas may be entered herein pending the final disposition of the cause and that the amount of security may be fixed by the order allowing the writ of error.

A. E. CRANE,
Z. T. HAZEN,
J. B. LARIMER,
Attorneys for Plaintiffs in Error.

Order Allowing Writ of Error.

STATE OF KANSAS,
Shawnee County, ss:

Let the writ of error issue upon the execution of a bond by the plaintiffs in error to the defendant in error in the sum of $500.00 such bond when approved not to act as a supersedeas.

Dated April 13th, 1918.

JOHN C. POLLOCK,
Judge of the United States District Court for the District of Kansas.

Filed in District Court on April 13, 1918.

Bond on Writ of Error.

Know all men by these presents, that we, J. E. Nadeau and Martha Nadeau, as principal, and R. L. Miller as sureties, are held and firmly bound unto the Union Pacific Railroad Company, defendant in Error, in the full and just sum of Five Hundred dollars, to be paid to the said Union Pacific Railroad Company, and their certain attorneys, executors, administrators, or assigns; to which pay-
82 ment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 13 day of April, 1918.

Whereas, lately at a term of the District Court of the United States for the District of Kansas, in a suit pending in said court between the Union Pacific Railroad Company, plaintiff and Joseph E. Nadeau, Martha Nadeau, his wife, George Huntsman and James I. Anderson, defendants, a judgment was rendered against the said defendants, giving to the plaintiffs the right, title and ownership of certain real estate described in the petition in said action, and for — dollars costs, and the said Joseph E. Nadeau, Martha Nadeau, George Huntsman and James I. Anderson having obtained a writ of error to

the Supreme Court of the United States to reverse the judgment in the aforesaid suit, and have a judgment entered in their favor against the Union Pacific Railroad Company.

Now, the condition of the above obligation is such, that if the said Joseph E. Nadeau, Martha Nadeau, George Huntsman and James I. Anderson, shall prosecute their writ of error to effect, and will pay the amount of said judgment and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

JOSEPH E. NADEAU.
MARTHA C. NADEAU.
R. L. MILLER.

Sealed and delivered in the presence of
A. E. CRANE.

Approved by
JOHN C. POLLOCK,
Judge of the District Court for the District of Kansas.

Filed in the District Court on April 15, 1918.

83 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, F. L. Campbell, Clerk of the District Court of the United States, for the District of Kansas, do hereby certify the within and foregoing to be a full, true and complete transcript of the record and proceedings in said court, in Case No. 1710 wherein The Union Pacific Railroad Company is Plaintiff and Joseph E. Nadeau, et al., are Defendants.

I further certify that the original Citation and Writ of Error are hereto attached and returned herewith.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Topeka, in said District of Kansas, this 29th day of April, A. D. 1918.

[Seal of District Court U. S., District of Kansas, 1861.]

F. L. CAMPBELL,
Clerk of said Court.

Endorsed on cover: File No. 26,551. Kansas D. C. U. S. Term No. 473. Joseph E. Nadeau, Martha Nadeau, his wife, et al., plaintiffs in error, vs. Union Pacific Railroad Company. Filed May 28, 1918. File No. 26,551.

In the Supreme Court of the United States

OCTOBER TERM, 1919

No. 119

JOSEPH NADEAU, MARTHA NADEAU, HIS WIFE, ET AL., PLAINTIFFS IN ERROR,

vs.

UNION PACIFIC RAILROAD COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS

BRIEF OF PLAINTIFFS IN ERROR

Z. T. Hazen,
J. B. Larimer,
A. E. Crane,
All of Topeka, Kansas,
Attorneys for Plaintiffs in Error.

FILED MAY [illegible], [illegible]

(26,551)

SUBJECT INDEX.

AUTHORITIES CITED.

In the Supreme Court of the United States

OCTOBER TERM, 1919

No. 119

JOSEPH NADEAU, MARTHA NADEAU, HIS WIFE,
ET AL., PLAINTIFFS IN ERROR,

vs.

UNION PACIFIC RAILROAD COMPANY,
DEFENDANT IN ERROR.

BRIEF OF PLAINTIFFS IN ERROR

STATEMENT OF FACTS.

The Union Pacific Railroad Company, the plaintiff below, brought an action in ejectment in the United States District Court within and for the State of Kansas, Eastern Division, to recover the possession of a strip of land 300 feet wide across the lands owned by the defendant, Joseph E Nadeau. The claim of the plaintiff to the 300-foot strip of land is based on certain acts of Congress granting a right of way across Indian reservations when the Indians' title was extinguished by the United States, and the defendants claim title to the lands by reason of certain treaties between the United States and the Pottawatomie tribe of Indians giving to the Indians the title thereto. The case was tried in the lower court on an agreed statement of facts and the lower

court found in favor the plaintiff and against the defendants.

The basis of the claims of the parties to the title to the land in dispute in this action is set out in admission number twenty-nine:

The part of admission twenty-nine referred to is as follows:

> "The defendants claim title through mesne conveyances under said treaty of 1861, and the allotments made thereunder and patents issued in accordance therewith and continuous occupancy and possession of said land." (Tr. 17.)
>
> "The plaintiff as the successor of the Leavenworth, Pawnee and Western Railroad Company claims a right of way four hundred feet wide, being two hundred feet on each side of its track through the lands described in in the petition, under the act of July 1, 1862, and acts amendatory of and supplemental thereto." (Tr. 17.)

Title of Defendants.

The claim of title of the defendants goes back to 1846, when the United States made a treaty with the Pottawatomie Tribe of Indians, *granting to the tribe of Indians a tract of land thirty miles square for their home forever.*

On June 5th and 17th, 1846, the United States entered into a treaty with the Pottawatomie Tribe of Indians. By the terms of the treaty, the United States granted to the tribe the possession and title to a tract or parcel of land containing 576,000 acres for the agreed consideration of $87,000 and the waiver by the tribe of their rights in other lands. (Admn. 17, Tr. 10.)

On November 15, 1861, the United States made a further treaty with said tribe of Indians. By the terms of this last treaty, it was provided that a part of the lands owned by the tribe under the treaty of 1846, should be allotted in sever-

alty to those of said tribe who had adopted the customs of the whites and desired a separate tract of land assigned to them.

Article 2 of said treaty provided that a census of the members of said tribe should be taken and the Indians should be classified in separate lists: (1) showing those desiring lands in severalty, and (2) those desiring lands in common.

It was further provided that the Commissioner of Indian Affairs should assign to each chief at the date of the signing of the treaty one section; to each headman one-half section; to each other head of a family, one-quarter section; to each other person 80 acres of land, to include in every case as far as practicable, to each family their improvements. It was further provided that it should not be alienable in fee only to the United States or Indians who were members of the tribe. (Admission 18, Tr. 11.)

On January 19, 1863, the Commissioner of Indian Affairs was called upon to construe the treaty of 1861, with reference to the rights of the heirs of Indians who had died after the date of the signing of the treaty and before the allotments were made and the Commissioner held:

> "It follows as a consequence of this construction that in case any such person has deceased since the date of the treaty (*that being the time the right of such person accrued*) his or her heirs as such will be entitled to receive the certificate of allotment to which such deceased person would have been entitled had he or she continued to live. (Admission 19, Tr. 11, 12.)

On January 16, 1863, Commissioners were appointed by the United States to make the allotments of land to the Indians desiring them, and, on November, 1863, they filed their report with the Secretary of the Interior and the report of the allotments were duly approved by the Secretary of the Interior on December 12, 1864. (Admn. 20, Tr. 12.)

At the time the treaty was entered into the Indians, to whom the allotments were made, lived upon the lands and had their improvements thereon. (Admn. 21, Tr. 12.)

The treaty of 1861 gave the railroad company, (naming it) a right of way across the reservation not to exceed in width 100 feet. (Admn. 22, Tr. 13.)

Patents were duly issued by the United States to the allotees under and by virtue of the provisions of said treaty of 1861. (Admn. 29, Tr. 17.) The right of way was inclosed by the railroad company with a fence fifty feet from the center of the track.

> "Defendants and their grantors have claimed to own and have used and cultivated and been in the actual possession of all of the land outside of said fences since the construction of the railroad." (Adm. 31, Tr. 17.)

No steps were ever taken by the United States to extinguish the title of the Indians to the lands in question. (Adm. 27, Tr. 16.)

Title of Plaintiff.

We will now refer briefly to the claim of title by which the plaintiff claims to own the land. The plaintiff claims title to the lands from the United States through certain acts of Congress granting a right of way to The Leavenworth, Pawnee & Western Railroad Company.

It is admitted that The Leavenworth, Pawnee & Western Railroad Company was duly incorporated and that the plaintiff is its successor. (Adms. 1-10, Tr. 8-9.)

On July 1st, 1862, an act of Congress was passed granting a right of way across public lands to the extent of 200 feet on each side of the center of the track. (Adm. 21, Tr. 14.) It was provided in said act of Congress that the railroad company named therein should, within one year after

the passage of the act file their consent to it in the office of the Secretary of the Interior, and within two years designate the general route of said road and file the map of the same with the Department of the Interior. (Adm. 23, Tr. 14.)

> "By section nine of the Act, it was enacted that the railroad company should build a railroad and telegraph line from the Missouri at the mouth of the Kansas River on the south side thereof so as to connect with the Pacific Railroad of Missouri, to the aforesaid point on the one hundredth meridian of longitude," etc. (Adm. 23, Tr. 14.)

On July 4, 1862, the railroad company filed in the Department of the Interior a map showing the probable route of its road west of Lawrence along the left bank of the Kansas River across the Pottawatomie Reservation to connect with the Union Pacific in Nebraska. (Adm. 23A, Tr. 14.) The public lands along the route were withdrawn from settlement. (Adm. 23A, Tr. 14.)

On July 2, 1864, an act of Congress was passed amending the act of 1862, giving the railroad companies named therein further time to comply with the act of 1862. In said act, it was provided that the railroad companies were authorized to take and hold land or premises that may be necessary and proper for the construction and working of the railroad, not exceeding in width 100 feet on each side of the center of its line. (Adm. 24, Tr. 15.)

Section 5 of said act of July 2, 1864, provided that the time for designating the general route of the railroads and filing the map and the completion of that part required by the act by the railroad companies was extended one year from the time in the act designated. (Adm. 25, Tr. 15.) The railroad company filed its map showing the general route of the railroad on July 1st, 1865. The route designated commenced at

a point on the state line between Kansas and Missouri and ran to the one hundredth meridian. (Adm. 25, Tr. 15.)

On January 11th, 1866, the railroad company filed its definite map of location. (Adm. 26, Tr. 16.)

By section 12 of said act of July 2, 1864, it was provided that the railroad company might build its railroad on the opposite side of the Kansas River from Lawrence and Topeka. (Adm. 27, Tr. 16.)

It was provided by section 2 of the act of July 2, 1864, that:

> "The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under operation of this act and required for the said right of way and grants hereinafter made." (Adm. 27, Tr. 16.)

No steps were ever taken by the United States to extinguish the Indian titles in so far as the lands involved in this action are concerned. (Adm. 27, Tr. 16.)

History of Events in their Order.

1st. Public domain until 1846.

2nd. June 5th and 17th, 1846, treaty between U. S. and Pottawatomie Tribe of Indians. (Tr. 10.)

3rd. Nov. 15, 1861, treaty between United States and Pottawatomie Tribe of Indians, authorizing the allotment of land in severalty to the members of tribe was signed and it was to take effect as of the date of the signing of the treaty. (Tr. 11.)

4th. Under the treaty of 1861, the Pottawatomie Tribe of Indians granted a right of way of 100 feet in width to the railroad company. (Tr. 13.)

5th. At the time the treaty of 1861 was made, the Indians were living on the lands allotted to them and the allotted lands covered their improvements. (Tr. 12.)

6th. An act of Congress passed on July 1st, 1862, granting right of way to railroad company upon conditions as follows:

A. File assent to provisions of the act with the Department of the Interior within one year.

B. Within two years after passage of act designate and file with the Department of the Interior a map of the general route of the railroad. (Tr. 9.)

7th. July 4, 1862, the railroad company designated the general route of its road from Lawrence, Kansas, to the Union Pacific in Nebraska. (Tr. 14.)

8th. Nov. 14, 1862, the railroad company accepted the grant of a right of way under the terms of the act of Congress of July 1, 1862. (Tr. 9.)

9th. On Jan. 16, 1863, three commissioners were appointed to make the allotments as provided by the treaty of 1861. (Tr. 12.)

10th. On Jan. 19, 1863, the Commissioner of Indian Affairs held that the rights of the prospective allotees accrued as of the date of signing the treaty Nov. 15, 1861. (Tr. 11-12.)

11th. The survey of the first 40 miles of U. P. E. D. was commenced on Sept. 28, 1863. (Tr. 16.)

12th. On November, 1863, the Commissioners appointed to make the allotments of the land in severalty to the members of the tribe, having made the allotments, submitted their report to the Secretary of the Interior for his approval. (Tr. 12.)

13th. On the 1st day of July, 1864, the railroad company, having failed to comply with the act of Congress of July 1st, 1862, with reference to filing a map of general route from the Missouri River to the Pacific Ocean, lost all rights thereunder. (Tr. 15.)

14th. On July 2, 1864, a second act of Congress was passed extending the time one year within which the railroad companies were given to designate the general route. (See Sec. 5 of Acts.)

15th. By said acts of Congress of July 2, 1864, the right of way for the railroad in Nebraska was reduced to a width of 200 feet where it did not cross the public domain. (See Sec. 3 of Act.)

16th. On Sept. 3rd, 1864, the railroad company accepted the grant under the act of Congress of July 2, 1864. (Tr. 9.)

17th. On Dec. 12, 1864, the Secretary of the Interior duly approved the report of commission appointed to make the allotments, which report had been filed with the Secretary of the Interior in November, 1863. (Tr. 12.)

18th. On July 1st, 1865, on the last day for designating and filing the map of the proposed route of the railroad, it filed the same. (Tr. 15.)

19th. On Jan. 11, 1866, the railroad filed its map of definite location. (Tr. 16.)

20th. The railroad company in 1866 built its railroad across the lands in question and occupied a strip of land 100 feet wide. They afterwards built a fence enclosing a strip that wide. (Tr. 10 and 17.)

21st. At no time did the allotees or those parties claiming under them recognize a right in the railroad company to a right of way of a greater width than 100 feet. (Tr. 17.)

22nd. Both acts of Congress provided the right of way across Indian reservation should be subject to the U. S. extinguishing the title of the Indians thereto. (Tr. 16.)

23rd. The United States did not extinguish and has not extinguished the Indian title to the right of way as provided by said acts of Congress. (Tr. R. 16.)

POINTS.

I.

THE LANDS INVOLVED IN THIS ACTION WERE NOT PUBLIC LANDS ON JULY 1, 1862, NOR WERE THEY PUBLIC LANDS ON JULY 2, 1864, WITHIN THE MEANING OF THE ACTS OF CONGRESS OF THOSE DATES.

Railroad Company v. U. S., 235 U. S. 40.
Railroad Co. v. Harris, 215 U. S. 386.
Kindred v. Railroad Co., 225 U. S. 595.
Leavenworth Ry. Co. v. U. S. 92 U. S. 735.
Wilcox v. Jackson, 13 Pet. 513.
Bardon v. Northern Pac. R. R., 145 U. S. 543.

II.

THE ACTS OF CONGRESS OF JULY 1, 1862, AND JULY 2, 1864, WERE NOT INTENDED TO GRANT A RIGHT OF WAY ACROSS THE LANDS INVOLVED IN THIS ACTION UNDER THE TERM "PUBLIC LANDS."

Bardon v. Railroad Co., 145 U. S. 543.
Wilcox v. Jackson, 13 Pet. 513.
Railroad Co. v. U. S., 92 U. S. 733.

Railroad Co. v. U. S., 235 U. S. 37, 40.
Railroad Co. v. U. S., 92 Kan. 742.
Railroad Co. v. Musser-Sauntry Co., 168 U. S., 610 .

III.

THE LANDS IN QUESTION BECAME INDIVIDUAL PROPERTY AT THE DATE OF SIGNING THE TREATY AND WHEN THE PATENTS WERE ISSUED THEY TOOK EFFECT AS OF THAT TIME.

Francis v. Francis, 203 U. S. 238-239.
Jones v. Meehan, 175 U. S. 1.
Stockton v. Williams, 1 Doug. 546.
McAffee v. Lynch, 26 Miss. 259.
Best v. Polk, 85 U. S. 118.
Francis v. Francis, 99 U. S. 15.
Doe v. Wilson, 23 Howard, 457.
Hartman v. Warren, 76 Fed. 157.
Meehan v. Jones, 70 Fed. 453.

IV.

THE TREATY OF 1861 GAVE TO THE ALLOTEES THE EQUITABLE TITLE IN THE LANDS ALLOTTED TO THEM FROM THE DATE OF SIGNING THE TREATY AND THE LEGAL TITLE BY THEIR COMPLYING WITH ITS PROVISIONS.

Jones v. Meehan, 175 U. S. 1.
Stockton v. Williams, 1 Doug. 546.
McAffee v. Lynch, 26 Miss. 259.
Smith v. Boninger, 132 Fed. 889.
Lownsberry v. Rakestraw, 14 Kan. 151.
Oliver v. Forbes, 17 Kan. 113, 130.
Francis v. Francis, 203 U. S. 238.

Doe v. Wilson, 23 Howd. 236.
Clark v. Lord, 20 Kan. 390.
Briggs v. McClain, 43 Kan. 653.
Art. 2 of Treaty 1861.

V.

THE TREATY OF 1861 GAVE THE PROSPECTIVE ALLOTEES AT THE TIME OF SIGNING THE TREATY A VESTED INTEREST IN THE ALLOTMENTS AND NO ACTS OF THEIRS ESTOP THEM FROM CLAIMING THAT THE RIGHT OF WAY SHOULD NOT EXCEED 100 FEET IN WIDTH.

Briggs v. McClain, 43 Kan. 653.
Clark v. Lord, 20 Kan. 390.
Francis v. Francis, 203 U. S. 239.
Bird v. Terry, 129 Fed. 472.
Oliver v. Forbes, 17 Kan. 130.
Doe v. Wilson, 23 Howd. 457.

VI.

THE INDIAN TITLE HAS NOT BEEN EXTINGUISHED TO THE LANDS INVOLVED IN THIS ACTION, AND THE TITLE THEREFORE REMAINS IN THE GRANTEE OF THE INDIANS.

Atlantic & Pac. Ry. Co. v. Mingus, 165 U. S. 437-440.
M. K. & T. Co. v. U. S., 235 U. S. 39, 40.
Leavenworth Ry. Co. v. U. S., 92 U. S. 743.
Railroad Co. v. U. S., 235 U. S. 41.
Doe v. Wilson, 23 Howd. 463.

VII.

THE INDIANS AND THEIR GRANTEES WERE THE FIRST TO COMMENCE PROCEEDINGS TO ACQUIRE

TITLE TO THE ALLOTMENTS AND HAVE THE BEST TITLE THERETO.

Union Pacific Ry. Co. v. Harris, 215 U. S. 386.
Railroad Co. v. Musser-Sauntry Co., 168 U. S. 610.
M. K. & T. Ry. Co. v. U. S., 235 U. S. 37.
Ry. Co. v. U. S., 92 U. S. 733.
Shepley et al. v. Cowan et al., 91 U. S. 331.
U. S. v. Detroit Lumber Co., 200 U. S. 334-335.
Benson Mining Co. v. Alta Mining Co., 145 U. S. 433.

VIII.

THE RAILROAD COMPANY ACCEPTED ITS GRANT OF RIGHT OF WAY UNDER THE ACT OF CONGRESS OF 1862, WITH FULL KNOWLEDGE OF THE PROVISIONS OF THE TREATY BETWEEN THE UNITED STATES AND THE POTTAWATOMIE TRIBE OF INDIANS, AND WAS BOUND THEREBY.

33 Cyc, 86-87.
West Va. & P. R. R. Co. v. Harrison Co. Court, 34 So. E. 787-789.
1 Elliott R. R., par. 116, 117.
Atlantic & Pac. R. R. Co. v. Mingus, 165 U. S. 439-440.
M. K. & T. R. R. Co. v. U. S., 235 U. S. 41.

IX.

THE RAILROAD COMPANY LOST ALL OF ITS RIGHTS AS AGAINST PARTIES ACQUIRING AN INTEREST BY ITS FAILURE TO FILE ITS MAP OF GENERAL LOCATION WITH THE DEPARTMENT OF THE INTERIOR WITHIN TWO YEARS FROM JULY 1, 1862.

Commissioners of Smith Co. v. Labore, 37 Kan. 480, 483.

Pugh v. Reat, 107 Ill. 440, 443.
Sheets v. Sheldon's Lessee, 2 Wall. (U. S.) 177.

X.

AN AMENDMENT TO AN ACT OF CONGRESS GIVES TO THE PORTIONS RETAINED NO FURTHER FORCE AND EFFECT THAN EXISTED AT THE TIME OF THE AMENDMENT.

Braddup v. Britten, 92 N. W. 452.

XI.

BY THE ACT OF CONGRESS OF JULY 2, 1864, THE RAILROAD COMPANY WAS FOR THE FIRST TIME GIVEN THE RIGHT TO BUILD ITS ROAD ON THE NORTH SIDE OF THE KANSAS RIVER, AND ITS RIGHTS TO A RIGHT OF WAY DATE FROM THAT TIME.

U. P. R. R. Co. v. Harris, 215 U. S. 389.

XII.

THE GRANT OF THE RIGHT OF WAY OF THE DEFENDANT DID NOT TAKE EFFECT UNTIL JULY 2, 1864.

U. P. R. R. Co. v. Harris, 215 U. S. 389.

XIII.

INDIAN TREATIES MADE PRIOR TO MARCH 2, 1871, WERE VALID AND BINDING BETWEEN THE UNITED STATES AND THE INDIAN TRIBE.

Uhlrig v. Garrison, 2 Dak. 98.
Sec. 2079, Rev. Stat. of U. S.
Ware v. Hyalton, 3 Dall. 199.
In re Race Horse, 70 Fed. 606, 607.

XIV.

THE DECISIONS OF THE COURT BELOW DISREGARDS THE TREATY OF 1861, AND THE PROVISIONS OF THE TWO ACTS OF CONGRESS, AND CANNOT BE SUSTAINED.

M. K. & T. R. R. Co. v. U. S., 235 U. S. 40.
Leavenworth Ry. Co. v. U. S., 92 U. S. 742.
Uhlrig v. Garrison, 2 Dak. 98.
Ware v. Hylton, 3 Dall. 199.
Atlantic & Pac. R. R. Co. v. Mingus, 165 U. S. 439-440.

XV.

WHY SHOULD THERE BE A DIFFERENCE BETWEEN A PARTY WHO HAS FILED A PRE-EMPTION ENTRY ON THE PUBLIC DOMAIN AND AN INDIAN ALLOTEE UNDER THE TREATY OF 1861.

Railroad Co. v. Harris, 215 U. S. 386.
Railroad Co. v. Harris, 76 Kan. 255.

BRIEF OF ARGUMENT.

I.

The Lands Involved in this Action Were Not Public Lands on July 1, 1862, Nor Were They Public Lands on July 2, 1864, Within the Meaning of the Acts of Congress of Those Dates.

There is but one question presented to this Court for its decision, and that is, were the lands involved in this action "public lands" within the meaning of the acts of Congress dated July 1, 1862, and July 2, 1864, granting a right of way to the Leavenworth, Pawnee & Western Railway Company and its successors.

Hon. John C. Pollock, Judge of the United States District Court, in his decision in this case in the court below, said:

> "In such case the road could neither forfeit, alienate nor abandon said right of way, or any part of it, without the consent or in pursuance of future action thereon, by the Congress, at this date must be deemed conclusively settled, determined and ended. Therefore, the only new question presented on this record is this:
>
> "Were the lands comprised within the Pottawatomie Indian Reservation at the date of the act of Congress making the grant, and the acceptance of its terms and provisions by the Leavenworth, Pawnee and Western Railroad Company, public lands of the United States of such nature and in such sense, under the terms of the treaty between the government and the Pottawatomie Indians by which their reservation was created, that the United States had the reserve power to make the grant of right of way claimed by plaintiff?"

It is plain that Judge Pollock must have held the lands to be public lands or his decision would have been for the defendants. The question propounded by Judge Pollock omits any reference to the treaty of 1861 and its provisions. There are a number of reasons why the lands involved in this action were not public lands July 1, 1862, or July 2, 1864. We will now call attention to a few of them.

1st. At the time the act of Congress of July 1, 1862, was passed the lands involved in this action were in the possession of the individual Indians to whom allotments had been promised under the provisions of the treaty of November 15, 1861.

2nd. They had their improvements on the land at the time, and the treaty provided that the lands upon which they had their improvements should be allotted to such Indians.

3rd. That they could get a patent in fee for the lands by accepting the allotments and carrying out certain provisions of the treaty of 1861.

4th. That they continued to live on the allotments and thereafter got patents therefor in acordance with the terms of the treaty.

It is very material to determine what the term "public lands" means within the aforesaid acts of Congress. It is claimed by the plaintiff in error that the term "public lands" as used in said acts of Congress, simply means lands not otherwise appropriated and subject to disposal by Congress under the general laws. In other words, "public lands" as used in said acts of Congress had the ordinary meaning applied to that term. This Court has frequently defined the term "public lands" and we will now call attention to a few of its decisions.

> "The land remained continuously appropriated to the use of the Indians or has been sold for their benefit. It never for a moment has become a part of the public domain in the ordinary sense."
>
> *Railroad Company v. U. S.*, 235 U. S. 40.

> "The words 'public lands' in legislation refers to such lands as are subject to sale or disposal under the general laws, and no other meaning will be attributed to them unless apparent from the context of or circumstances attending the legislation."
>
> *Railroad Co. v. Harris*, 215 U. S. 386.

> "It therefore is not as if congress had undertaken to grant a right of way through these lands without either the assent of the assignees or any provision for compensating them. As respects these lands, the right of way section in the act of 1862, did not stand alone, but was to be taken in connection with the treaty provision. The two together, meant that the right of way was granted, not merely by the United States, but with the assent of the Indian assignees, and that the latter were to be jointly compensated."
>
> *Kindred v. Railroad Co.*, 225 U. S. 595.

"The doctrine in *Wilcox v. Jackson*, 13 Peters, 498, that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands,, and that no subsequent law or proclamation will be construed to embrace it, or to operate upon it, although no exception be made of it, reaffirmed and held to apply with more force to Indian than to military reservations, inasmuch as the latter are the absolute property of the government while in the former other rights are vested."

Leavenworth Ry. Co. v. United States, 92 U. S. 733.

"But we go further and say that, whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it."

Wilcox v. Jackson, 13 Pet. 513.

"But the decision has been uniformly adhered to since its announcement, and this writer, after a much larger experience in the consideration of public land grants since that time, now readily concedes that the rule of construction adopted, that, in the absence of any express provision indicating otherwise, a grant of public lands only applies to lands which are at the time free from existing claims, is better and safer, both to the government and to private parties, than the rule which would pass the property subject to the liens and claims of others."

Bardon v. Northern Pac. R. R., 145 U. S. 543.

II.

The Acts of Congress of July 1, 1862, and July 2, 1864, Were Not Intended to Grant a Right of Way Across the Lands Involved in this Action under the Term "Public Lands."

By the terms of said acts of Congress, they did not grant a right of way across the lands within the Pottawatomie Indian Reservation as public lands. There was no express provision in either of said acts indicating that Congress meant to grant a right of way across Indian lands under the term "public lands", without an express provision indicating that it was intended by Congress to give the grant a broader meaning, the grant should be construed to cover public lands in its ordinary sense.

Section 2 of the act of Congress of July 1, 1862, provides:

> "And be it further enacted, that the right of way through the public lands be, and the same is hereby granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber and other material for the construction thereof; said right of way is granted to said railroad to the extent of 200 feet in width on each side of said railroad where it may pass over the public land, . . . *The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act, and required for the said right of way and grants hereinafter made.*"

It is plain that the aforesaid act of Congress did not intend to include in its grant the lands in an Indian reservation or which had been allotted to Indians, under the term "public lands," as the latter part of the section refers to

Indian lands and how the title should be extinguished. The act recognizes the title of the Indians to the lands, and that it must be extinguished before the railroad company could claim the title thereto.

The grant to the railroad company was bottomed on the proposition that the title must be extinuished. The railroad company took the land subject to that grant and it has no right to ignore it.

The act of July 2, 1864, also provides with reference to Indian lands as follows:

> "And the United States shall extinguish, as rapidly as may be, consistent with public policy and the welfare of said Indians, the Indian title to all lands falling under the operation of this section, and required for the said right of way and grant of lands herein made." (Sec. 18.)

The act of 1864 also provides that the Indian title must be extinguished by the United States. It is plain that Congress did not intend to grant a right of way across Indian reservations, under the head of "public lands." That being the case, Congress meant that the title should be extinguished by the Federal Government, and not by the railroad company. It is also plain from the reading of the two acts of Congress, that it was not intended to grant a right of way over the Indian reservations under the head of "public lands."

> "And of the Indians' right of occupancy it said, that this right, with the correlative obligation of the government to enforce it, negatived the idea that congress, even in the absence of any positive stipulation to protect the Osages, intended to grant their land to a railroad company, either absolutely or *cum onere*."
>
> *Bardon v. Railroad Co.*, 145 U. S. 543.

"But we go further and say that, whenever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it, *although no reservation were made of it.*"

Wilcox v. Jackson, 13 Pet. 513.

"But the decision has been uniformly adhered to since its announcement, and this writer, after a much larger experience in the consideration of public land grants since that time, now readily concedes that the rule of construction adopted, that in the absence of an express provision indicating otherwise, a grant of public lands only applies to lands which are at the time free from existing claims, is better and safer, both to the government and to private parties, than the rule which would pass the property subject to the liens and claims of others."

Bardon v. Railroad Co., 145 U. S. 543.

"The doctrine in *Wilcox v. Jackson*, 13 Peters, 498, that a tract of land lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace it, or operate upon it, although no exception be made of it, reaffirmed and held to apply with more force to Indians than to military reservations, inasmuch as the latter are the absolute property of the government while in the former, other rights are vested."

Railroad Co. v. U. S., 92 U. S. 733.

"A special exception of it was not necessary; because the policy which dictated them confined them to land which congress could rightfully bestow, without disturbing existing relations and producing vexatious conflicts. . . . Every tract set apart for special uses is

reserved to the government, to enable it to enforce them. There is no difference in this respect, whether it be appropriated for Indian or other purposes."

Railroad Co. v. U. S. 92 U. S. 733.

"A statute granting public lands or Indian lands which may become public lands, will not be construed as including Indian lands afterwards allotted in severalty under a treaty made immediately before the enactment of the statute, as to do so would be to charge the government with bad faith with the Indian owners of the land."

Railroad Co. v. U. S., 235 U. S. 37, 40.

"The legislation which reserved it for any purpose excluded it from disposal as public lands are usually disposed of; and this act discloses no intention to change the long continued practice with respect to tracts set apart for the use of the government or of the Indians. As the transfer of any part of an Indian reservation secured by treaty would also involve a gross breach of the public faith, *the presumption is conclusive that* CONGRESS NEVER MEANT TO GRANT IT."

Railroad Co. v. U. S., 92 U. S. 742.

"Indeed the intent of Congress in all railroad land grants, as has been understood and declared by this court again and again, is that such grant shall operate at a fixed time, and shall take only such lands as at the time are public lands."

Railroad Co. v. Musser-Sauntry Co., 168 U. S. 610.

III.

The Lands in Question Became Individual Property at the Date of Signing the Treaty and When the Patents Were Issued they Took Effect as of that Time.

Pursuant to the terms of said treaty of November 15, 1861, a census of the tribe was taken, certificates of allotments issued to the members of the tribe desiring allotments in severalty and patents thereafter were duly issued by the United States for each of said allotments to the allottees and in case of death to their heirs.

There are a number of admissions which relate to the aforesaid claims. We will now call attention to said admissions.

Admission number 20:

> "20. Subsequent to July 1, 1862, and pursuant to the said treaty of 1861, with the Pottawatomie Indians a census of the Indians was made in accordance therewith and certificates of allotments were issued to the allotees in accordance with said treaty and as provided therein, and that commissioners were appointed January 16, 1863, by the United States to make the allotments and in November, 1863, the said commissioners submitted their report of the allotments made, which allotments included the land in question in this action, and on December 12, 1864, the allotments were duly approved by the Secretary of the Interior as follows:
>
> " 'Department of the Interior,
> December 12, 1864.
>
> " 'The foregoing list of Pottawatomie allotments made under the second article of the treaty with that tribe of November 15, 1861, is hereby approved.
>
> " 'J. P. Usher, Secretary.' "

Admission number 29:

> "Patents were duly issued to the allotees of the lands involved herein. Such patents made no reservation of a right of way. The defendants claim title through mesne conveyances under said treaty of 1861, and the allotments made thereunder and the patents issued in accordance therewith."

Joseph E. Nadeau acquired his title through mesne conveyances from the allotees under the treaty signed on November 15, 1861, and ratified by the United States Senate on the 22nd day of April, 1862. The act of Congress attempting to grant a right of way through the Pottawatomie Indian Reservation was not passed until July 1, 1862, long after the treaty was signed and ratified by the United States Senate. It was provided in the Indian treaty, that tracts of land should be *assigned to* those Indians desiring allotments *at the time of the signing of the treaty.* The Indian office in 1863 was called upon to construe the treaty with reference to Indians who had died after the signing of the treaty and before the allotments were made, as to whether their heirs should receive the certificate of allotment of the Indian so deceased, and the Indian office held that the heirs of such Indian were entitled to his certificate of allotment. The Indian office also held that the rights of the allotees accrued on the date of the treaty. The treaty and the construction placed upon it by the Indian office show conclusively that the Indians who were to receive allotments took them *in presenti,* and thereby had a vested interest in them. They were not public lands, under the meaning of the law. Pursuant to the treaty aforesaid, the allotments were made to the Indians desiring such allotments, and in the case at bar the allotments finally ripened into patents from the United States to the allotees and their heirs. The Indians in the case at bar who received the allotments for the land in question were

first in the commencement for the acquisition of the title to the land in question, and their efforts were followed up and ripened into patents from the United States. When the patents were issued by the United States to the allotees, or their heirs in case of their death, the patents became operative as of the date of signing of the treaty, which was November 15, 1861.

The authorities cited below sustain the foregoing claim.

> "Whilst, according to previous decisions of this court, no vested right in the public lands as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property. In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."
>
> *Shepley et al. v. Cowan et al.*, 91 U. S. 331.

> "A patent from the United States operates to transfer the title, not merely from the date of the patent, but from the inception of the equitable right upon which it is based. *Shepley v. Cowan*, 91 U. S. 330. Indeed, this is generally true in cases of the merging of an equitable right into a legal title. Although the patents in this case were not issued until after the sales of the timber, yet when issued they became operative as of the date of the original entries."
>
> *United States v. Detroit Lumber Co.*, 200 U. S. 334-335.

> "In *Stark v. Starrs*, 6 Wall. 402, 418, this court observes that 'the right to a patent once vested is treated by the Government when dealing with the public lands, as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the

right of the patentee, so far as it may be necessary to cut off intervening claimants.' In *Worth v. Branson*, 98 U. S. 118, it was held that 'a party who has complied with all the terms and conditions which entitle him to a patent for a particular tract of public land, acquires a vested interest therein, and is to be regarded as the equitable owner thereof.'"

Benson Mining Co. v. Alta Mining Co., 145 U. S. 433.

Under the foregoing decisions the Indians were first in the commencement of proceedings for the acquisition of title to the lands involved in this action. The Indian tribe purchased the reservation in 1846, and paid therefor. In 1861, the tribe of Indians made another treaty with reference to the land involved in this action and under its provisions they finally acquired the title in fee simple by a patent from the United States. We will call the attention of the Court to the treaties and rights acquired thereunder.

The treaty of 1846 was the first step taken by the Pottawatomie Tribe of Indians in acquiring the fee simple title to the lands involved in this action. The tribe paid $87,000 in cash and ceded all their right and title to land elsewhere, to the United States. The United States after that time could not take away the rights thus acquired without the consent of the Indians.

The treaty of November 15, 1861, between the United States and the Pottawatomie Tribe of Indians, was the second step taken by the Pottawatomie Indians toward acquiring the legal title to the lands involved in this action. By the terms of said treaty it was provided that:

"It is therefore agreed by the parties hereto that the commissioner of Indian affairs shall cause the whole of said reservation to be surveyed in the same manner as public lands are surveyed, the expense whereof shall be paid out of the sales of lands hereinafter provided for, and the quantity of land hereinafter provided to be set

apart to those of the tribe who desire to take their lands in severalty, . . . and thereupon there shall be assigned, under the direction of the commissioner of Indian affairs, to each chief at the signing of the treaty, one section; to each head-man one half section; to each head of a family one quarter section; and to each other person eighty acres of land; . . . when the assignments shall have been completed certificates shall be issued by the commissioner of Indian affairs for the tracts assigned in severalty, . . . and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs. Until otherwise provided such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee or lease or disposed of only to the United States or to persons then members of the Pottawatomie Tribe, and of Indian blood with the permission of the President, . . . and on receipt of such certificates the persons to whom they are issued shall be deemed to have relinquished all right to any portion of the land assigned in severalty, or to a portion of the tribe in common," etc.

Article 3 of said treaty further provided that:

"At any time hereafter when the President of the United States shall have become satisfied that any adults, being males and heads of families, who may be allotees under the provisions of the foregoing article are sufficiently intelligent and prudent to control their affairs and interests, he may at the request of such persons, cause their lands severally held by them to be conveyed to them by patent in fee simple, with power of alienation," etc.

The aforesaid treaty of 1861 gave new rights to the individual Indians that were not conferred upon them by the treaty of 1846. By the terms of the treaty the Indians, who desired to take allotments, had those rights conferred upon them.

Under the treaty of 1861, it was provided that an allotee should have the allotment forever, and in case of his death it should go to his heirs. The allotee gave up his interest in the other lands upon the reservation that he might own and possess the tract of land allotted to him. He gave value for the allotment. The Government recognized his rights in the other land and required him to waive his rights thereto by reason of the land to be allotted to him. In the treaty of 1861, it was provided for the sale of the surplus land on the reservation upon certain terms, and the proceeds thereof to be credited to the Indian tribe. By such provision the United States recognized the Indian tribe as the owners of the equitable title to the reservation. Had it been otherwise, the United States would have kept the proceeds of the sale of the surplus lands. All the rights of the United States in the lands on the Pottawatomie Reservation were that of a trustee or guardian.

Under the treaty of 1861, an allotee who complied with the terms of the treaty with reference to procuring a patent in fee simple had a right to such patent. In such case he became the legal as well as the equitable owner of the land. There was nothing that prevented the allotee from acquiring the fee simple title, if he complied with the treaty and possessed the necessary qualifications. In this case it must be presumed that the Indian allotees possessed the necessary qualifications under the treaty and complied with its provisions as in each case it is admitted patents in fee simple were issued to the allotees.

> "It would be a hard rule to hold reservees under this treaty, in case of contest, were required to prove not only that the locations were made by the public officers, but that the conditions on which these officers were authorized to act, had been observed by them. Such a rule would impose a burden upon reservees not contemplated by the treaties and of necessity leave their titles

> in an unsettled state. . . . It has been frequently held by this court that a grant raised the presumption that the incipient steps required to give it validity have been taken."
>
> *Best v. Polk*, 85 U. S. 118.

The allotees had a better title to the lands allotted to them under the treaty of 1861, from the time of the signing of the treaty, than a homesteader who has filed his claim upon the public domain and located thereon, and who has not yet complied with all of the requirements of the law to entitle him to a patent. In either case the parties are entitled to a patent in fee simple by complying with the law or the treaty as the case may be.

The Pottawatomie Tribe of Indians never surrendered the title of the land acquired by them by the treaty of 1846, but step by step they kept on until they acquired the fee simple title to the land. When the patents were issued to the allotees, they became operative as of the date of the treaty of 1861. The treaty of 1861 was the commencement of the right of the allotees to acquire the title in fee simple. The patents issued to them related back to the date of the treaty insofar as it was necessary to cut off intervening claimants.

Judge Pollock in his memorandum decision said:

> "All that was granted by said treaty or the succeeding treaty of November 15, 1861, was a right of possession and occupancy such as was usually given by the government to Indian tribes with the fee retained by and thereafter residing in the government until passed by patent to the individual allotee or purchaser of the surplus lands in accordance with the provisions of the treaty." (Tr. 41.)

Judge Pollock held that under the two treaties the Indians had only the right of possession and occupancy such as was usually given by the Government to Indian tribes. If Judge

Pollock had confined that claim to the treaty of 1846, we would agree with him. Under the treaty of 1861, the lands were to be allotted to the individual Indians. From that time on the lands allotted to the individual Indian, became his property and at his death it would go to his heirs. For the protection of the Indian allotee the United States retained the legal title. The treaty prohibited the allotees from conveying the fee title to any one other than the United States and to Indians who were members of the tribe. Without title in fee how could an allotee convey it? Article 3 of said treaty of 1861 provided how the allotees could procure patents to be issued to them for the lands allotted to them. Under said article, when the President became satisfied that any male adult was sufficiently intelligent and prudent to control his own affairs, he might cause a patent to be issued to him for the lands embraced within his allotment. The United States had no right or authority to convey the title to the allotments to anyone, only in the manner provided in the treaty. The treaty of 1861, was the source of title of the individual allotees. Under and by virtue of its terms, the title to the lands in question were acquired. We will call attention to some of the decisions of the Court on this subject.

> "When the United States in a treaty with an Indian tribe, as part of the consideration for the cession by the tribe of a tract of country to the United States, makes a reservation to a chief or other member of the tribe of a specified number of sections of land, whether already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into ~~un-~~individ ~~divided~~ property; the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple; and that title is alienable by the grantee at his pleasure, unless the United States, by a provision of the treaty, or of an act of Congress, have expressly or impliedly prohibited or restricted its alienation."
>
> *Jones v. Meehan*, 175 U. S. 1, 21.

"The treaty itself operated as a grant of land to each of the several reservees, which became perfect when the land was located under the direction of the president of the United States, and no patent was necessary to perfect title."

Stockton v. Williams, 1 Doug. 546.

"The treaty in this case is the source of the Indian title, the location is intended to give identity to the land granted; the two together, the treaty and location, constitutes the title. The treaty being the source of title, must be treated as the substantial part of the transaction, to which the title itself will have relation when completed by a location of the land."

McAffee v. Lynch, 26 Miss. 259.

"It would be a hard rule to hold reservees under this treaty, in case of contest, were required to prove not only that the locations were made by the public officers, but that the conditions on which these officers were authorized to act had been observed by them. Such a rule would impose a burden upon the reservees not contemplated of the treaties and, of necessity leave their titles in an unsettled state. The treaty granted the land, but the location had to be fixed before the grant could become operative. After this was done, the estate became vested and the right to it perfect, as much so as if the grant had been directly executed to the reservee. It has been frequently held by this court that a grant raises a presumption that the incipient steps required to give it validity have been taken."

Best v. Polk, 85 U. S. 118.
Best v. Polk, 18 Wall. 112.
U. S. v. Brooks, 10 How. 442.

"It was held that the location of the lands became a duty devolving on the President by the treaty; that this duty he could execute without an act of Congress, the

treaty, when ratified, being the supreme law of the land, which the President was bound to see executed; that locality was given by the terms of the treaty, with an authority to locate afterwards by a survey making it definite; that, this authority being executed, the grant became as valid as to the particular section designated by the President as though the description had been incorporated in the treaty itself; that thereupon a fee passed to the reservee; and that the rights of the parties could in no wise be affected by the subsequent acts of the President directing a patent to be issued."

Frances v. Frances, 99 N. W. 15.
Stockton v. Williams, 1 Doug. 546.
Jones v. Meehan, 175 U. S. 1.
Doe v. Wilson, 23 How. 457.
Francis v. Francis, 203 U. S. 233; squarely in point.

"Where a selection of lands for allotment has been made by an Indian, and his right to their allotment to him has attached, the act of the alloting commission in wrongfully allotting them to another can not operate to cut off the heirs of the person entitled to the allotment, who, under the act under which the alllotment was made, succeed to his interest."

Smith v. Bonifer, 132 Fed. 889.
Lownsberry v. Rakestraw, 14 Kan. 151.
Oliver v. Forbes, 17 Kan. 113.

"The location of a tract of public land by an alleged beneficiary under the seventh clause of the second article of the treaty of September 30, 1854 (10 Stat. 1109), between the United States and the Chippewa Indians of Lake Superior, segregates the tracts from the public domain and were appropriated to private use."

Hartman v. Warren, 76 Fed. 157.
Francis v. Francis, 136 Mich. 288.

"The treaty of October 2, 1863, between the United States and the Chippewa Indians, provided that there

should be "set about from the tract" thereby ceded a reservation of 640 acres, near the T. river, for the chief, M. Held, that the effect of such provision was to vest in M. such a title of interest in the 640 acres that, upon selection made, he could execute a valid lease thereof, within the approval of the secretary of the interior."

Meehan v. Jones, 70 Fed. 453.
In re Doe v. Wilson, 23 How. 457.

IV.

The Treaty of 1861 Gave to the Allotees the Equitable Title in the Lands Allotted to Them from the Date of Signing the Treaty, and the Legal Title by Complying with Its Provisions.

The treaty of 1861, gave the Indians referred to therein at the time of signing the treaty an inheritable interest to their allotments, and the Indian Office, when called upon to construe said treaty with reference to the rights of heirs of Indians who had deceased after the signing of the treaty and before the allotments were made, held that the heirs had the right to receive the certificate of allotments to which a deceased Indian would have been entitled had he continued to live until after the allotment was made.

There are two admissions dealing with the aforesaid claim. They are numbered eighteen and nineteen, and the parts of said admissions which support the foregoing claim are as follows:

Admission 18:

"By the terms of this treaty it was provided that the reservation, . . . should be allotted in severalty to those of said tribe who had adopted the customs of the whites and desired a separate tract assigned to them, and it was further provided in said treaty, . . . and

thereupon there shall be assigned under the direction of the commissioner of Indian affairs, to each chief *at the signing of the treaty*, one section; to each head man, one-half section," etc.

Admission 19:

"Department of the Interior,
Office Indian Affairs,
January 19, 1863.

"W. W. Ross, Esq.,
U. S. Agent,
President.

"Sir:

"I have to acknowledge your communication of December 10, 1862, enclosing resolutions passed by the Pottawatomie Business Committee relative to allowing heirs of deceased members of the tribe who were living at the date of the treaty to draw their proportion of land. In reply, I have to say that according to the construction given to said treaty by this office, all persons of the Pottawatomie Nation who were alive at the date thereof became entitled to lands in severalty upon the ratification of the treaty by the senate. It follows as a consequence of this construction that in case any such person has deceased since the date of the treaty (that being the time the right of such person accrued) his or her heirs as such will be entitled to receive the certificate of allotment to which such deceased person would have been entitled had he or she continued to live.

"Very respectfully,
Your Obt. Servt.,
William P. Dole, Commissioner."

By the terms of the treaty, the rights of the prospective allotees accrued as of the date of signing the treaty, which was November 15, 1861. By the treaty the parties eligible to have allotments were given them at the time of signing the treaty. As soon as the treaty was signed and ratified they each had an allotment. It only had to be indentified. By reason thereof no room is left for interpreting the treaty to

the contrary. If the treaty is valid it gave to them the allotments as of the time of the signing of the treaty, and when made it was the same as though the allotments had been described and had been set out in the treaty to each individual allotee. By the terms of the treaty it was a grant *in presenti* to each individual allotee. That being the case, each allotee had a vested right in the allotment afterwards made to him at the time the treaty was signed. It only lacked indentification to make the title complete. Many times the courts have construed treaties providing for allotments to Indians, to be *in presenti*, although nothing was said in the treaty about the time the allotments should become effective. The cases referred to are hereinafter set out.

INDIAN TREATIES.

"When the United States in a treaty with an Indian tribe, as part of the consideration for the cession by the tribe of a tract of country to the United States, makes a reservation to a chief or other member of the tribe of the specified number of sections of land, whether already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into ~~un~~individual ~~divided~~ property; the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple; and that title is alienable by the grantee at his pleasure, unless the United States, by provision of the treaty, or of an act of Congress, have expressly or impliedly prohibited or restricted its alienation."

Jones v. Meehan, 175 U. S. 1, 21.

"The treaty itself operated as a grant of land to each of the several reservees, which became perfect when the land was located under the direction of the president of the United States, and no patent was necessary to perfect title."

Stockton v. Williams, 1 Doug. 546.

"The location of a tract of public land by an alleged beneficiary under the seventh clause of the second article of the treaty of September 30, 1854 (10 Stat. 1109), between the United States and the Chippewa Indians of Lake Superior, segregates the tract from the public domain and appropriates it to private use."

Hartman v. Warren et al., 76 Fed. 157.

"The treaty in this case is the source of the Indians' title; the location is intended to give identity to the land granted; the two together, the treaty and location, constitute the title. The treaty being the source of title, must be treated as the substantial part of the transaction, to which the title itself will have relation when completed by a location of the land."

McAffee v. Lynch, 26 Miss. 259.

"Where a selection of lands for allotment has been made by an Indian, and his right to their allotment to him has attached, the act of the alloting commissions in wrongfully allotting them to another cannot operate to cut off the heirs of the person entitled to the allotment, whom under the act under which the allotment was made, succeed to his interest."

Smith v. Boniger, 132 Fed. 889.
Lownsberry v. Rakestraw, 14 Kan. 151.
Oliver v. Forbes, 17 Kan. 113.

"But in that case, after an extended review of the previous decisions, this court further said: "The clear result of this series of decisions is that when the United States, in a treaty with an Indian tribe, and as part of the consideration for the cession by the tribe of a tract of country to the United States, make a reservation to a chief or other member of the tribe of a specified number of sections of land, whether already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into individual property; the reservation, unless accompanied by words limiting its

effect, is equivalent to a present grant of a complete title in fee simple; and that title is alienable by the grantee at his pleasure unless the United States, by a provision of the treaty, or of an act of Congress, have expressly or impliedly prohibited or restricted its alienation."

Francis v. Francis, 203 U. S. 238.

"The treaty of October 2, 1863, between the United States and the Chippewa Indians, provided that there should be 'set apart from the tract' thereby ceded a reservation of 640 acres, near the T. river, for the chief, M. Held, that the effect of such provision was to vest in M. such title of interest in the 640 acres that, upon selection made, he could execute a valid lease thereof, within the approval of the secretary of the interior."

Meehan v. Jones, 70 Fed. 453.
In re Doe v. Wilson, 23 How. 457.

In January, 1863, the United States appointed commissioners to prepare a census for the allotment of the Indian lands under the treaty ratified by the United States Senate in April, 1862. At the time of the appointment of the commissioners to make the allotments they called upon the Commissioner of Indian Affairs to construe the aforesaid treaty with reference to the rights of the heirs of Indians who had died between the time the treaty was signed and the time of making the allotment as to whether their heirs should receive the certificate of allotment to which such deceased Indian would have been entitled had he lived. Upon such request the Commissioner of Indian Affairs instructed the commissioners appointed to make the allotment as follows:

"It follows as a consequence of this construction that in case any such persons has deceased since the date of the treaty (that being the time the right of such person accrued) his or her heirs as such will be entitled to receive the certificate of allotment to which such

deceased person would have been entitled had he or she continued to live."

From the foregoing it is plain that the Indian Office construed the treaty with reference to Indians who were entitled to receive allotments, that their rights accrued as of the date of the signing of the treaty, and that construction of said treaty has been adhered to by that department ever since that time. The courts should follow the construction placed upon the treaty by the Indian Office, and are not at liberty to depart therefrom without very good reasons.

"The district and circuit courts of the United States are always open for the transaction of some business which may be transacted under the orders of the judge in his absence, and on such transaction rest the plaintiff's claims in this case, which the court sustain as business which could be transacted by the clerk in the absence of the judge, following the departmental construction of the statutes.

"Of course, if that construction were obviously or clearly wrong it would be the duty of the court to so adjudge; but if there simply be doubt as to the soundness of that construction, the action of the Government in conformity with it for many years should not be overruled except for cogent reasons."

United States v. Finnell, 185 U. S. 236.

"The courts cannot review the weight or admissibility of the evidence on the question whether an alien was unlawfully in the country, and a decision to that effect by the Department of Labor, supported by any evidence, is conclusive."

Ex parte Chin Him, 227 Fed. 131.

"In case of ambiguity in a statute, contemporaneous and uniform executive construction is regarded as decisive."

Brown v. United States, 113 U. S. 568.

"When there has been a long acquiescence in a department regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons."

Robertson v. Downing, 127 U. S. 608.

"A construction of a doubtful or ambiguous statute by the executive department charged with its execution, in order to be binding upon the courts, must be long continued and unbroken."

Merritt v. Cameron, 137 U. S. 542.

"The statute being of doubtful construction as to what fees were to be returned, the interpretation of it by judges, heads of departments, and accounting officers, contemporaneous and continuous, was one on which the obligors in the bond had a right to rely, and, it not being clearly erroneous, it will not now be overturned."

United States v. Hill, 120 U. S. 170.
United States v. Graham, 110 U. S. 219.
United States v. Hitchcock, 205 U. S. 80.

"A settled construction by a department of the United States of the laws of the United States will not be overturned by the courts unless such construction is clearly wrong."

Nichols v. Waukesha Canning Co., 195 Fed. 806.
Hewitt v. Schultz, 180 U. S. 139.
U. S. v. Healey, 160 U. S. 136.

The treaty of 1861 was construed by the Department of the Interior to take effect as of the date of the signing of the treaty which was November 15, 1861, and that the heirs of an Indian who were living at that date were entitled to the land that would have been allotted to him had he lived until the allotments were made. The treaty of 1861 gave the In-

dians an inheritable interest in the allotments, and in case of the death of an allotee, his heirs inherited the same. The interest given by the treaty in effect was the equitable title to the land covered by the allotment. The Supreme Court of Kansas many years ago upheld the claim that the title of the Indians was an equitable one, and that it could be passed by inheritance.

> "Under the act of Congress of August 4, 1886, par. 2, (24 Stat. at Large, 219) which provides that, on the death of an allotee of land under the treaty of June 28, 1862, with the Kickapoo Indians leaving heirs, and without having obtained the patent, the Secretary of the Interior shall cause a patent in fee simple to issue, in the name of the original allotee, the title passes from the Government to the heirs of the deceased allotee."
>
> *Briggs v. McClain*, 43 Kan. 653.

> "Where a member of the Ottawa tribe of Indians, who, if she had lived until after the issuance of the patents of the land reserved for the members of the tribe, would have been entitled to receive eight acres of land, under article 3d of the Ottawa treaty of 1862, died in the fall of 1862, a few months after the ratification and promulgation of said treaty, held that at the time of her death she had an inheritable estate in such land, reserved to the members of the tribe, which descended under the laws of the state to the heirs."
>
> *Clark v. Lord*, 20 Kan. 390.

The Supreme Court of this State, in 1876, construed the treaty of 1861 as to the rights of the heirs of a deceased allotee, before patent was issued, and held that the allotee owned the equitable title in the allotment. The case referred to is *Oliver v. Forbes*, 17 Kan. 130, on which page the court said:

> "John Riley in his lifetime had the equitable title to said land; and his certificate of allotment was sufficient

evidence thereof. When he died, his wife and children succeeded to his rights by inheritance, and not by purchase."

We call attention to that provision in the treaty of 1861, wherein it is provided as follows:

> "Until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale, *and shall be alienable in fee or leased or otherwise disposed of only to the United States, or to persons then being members of the Pottawatomie Tribe and of Indian blood.* (Art. 2 of treaty 1861.)

How could the allotee convey the title in fee to his allotment to the United States, unless he had the title. It also provided that the allotee with the consent of the President could convey the title in fee to an Indian, a member of the tribe. If the Indian allotee could convey the title under any circumstances, it was because he had the title. Land held under such circumstances cannot be public lands. Congress has no power to give lands so held to a railroad company for a right of way without the consent of the owner, even though he be an Indian.

Judge Pollock does not refer to this claim of the defendants. The Judge simply holds that the lands were public lands and under the control of Congress. If that be true, it is because the United States does not keep and should not keep its contracts and treaties with Indian tribes.

The Supreme Court of the State of Kansas, in 1876, held that the allotees under the Pottawatomie treaty of 1861 had the equitable title to the lands allotted to them.

In the case of *Oliver v. Forbes*, 17 Kan. 130, the court said:

> "John Riely in his lifetime *had the equitable title in said land;* and his certificate of allotment was sufficient

evidence thereof. When he died, his wife and children succeeded to his rights by inheritance, and not by purchase."

Clark v. Lord, 20 Kan. 390.
Briggs v. McClain, 43 Kan. 653.

"And of the Indians' right of occupancy it said: that this right, with the correlative obligation of the government to enforce it, negatived the idea that Congress, even in the absence of any positive stipulation to protect the Osages, intended to grant their land to a railroad company, either absolutely or *cum onere.* For all practical purposes the court added, 'they owned it; as the actual right of possession, the only thing they deemed of value, was secured to them by treaty, until they should elect to surrender it to the United States.' "

Bardon v. Northern Pac. R. R., 145 U. S. 543.
Wilcox v. Jackson, 13 Peters, 498.

In the treaty of 1867 the United States was providing for the sale of all of the allotments made to the citizen Pottawatomie Indians. The tribe and the United States by treaty agreed that the father should receive the patents for his minor children and sell his allotment and collect the money therefor. The Supreme Court in the Veale case simply held that the foregoing provision in the treaty with reference to the members of the family was valid and that the conveyance by the father was legal. The other decisions cited above and dealing with Indian titles clearly show that the Indians were the equitable owners of the land covered by their allotments under the treaty of 1861. The Department of the Interior construed the treaty in 1863 as giving the Indians a vested right in the allotments from the date of the treaty.

V.

The Treaty of 1861 Gave the Prospective Allotees at the Time of Signing the Treaty a Vested Interest in the Allotments and No Acts of Theirs Estop Them from Claiming that the Right of Way Does Not Exceed One Hundred Feet in Width.

The treaty of 1861 by its terms and as it was construed by the Department of the Interior took effect as of the date of the signing of the treaty, which was November 15, 1861, and the heirs of an Indian, who was living at that date, were entitled to the land that would have been allotted to him had he lived until the allotments were made. The treaty of 1861, gave the Indians an inheritable interest in the allotments and in case of the death of an allotee, his heirs inherited the same. The interest given by the treaty in effect was the equitable title to the land covered by the allotment. The Supreme Court of Kansas many years ago upheld the claim that the title of the Indians was an equitable one, and that it could be passed by inheritance.

> "Under the act of Congress of August 4, 1886, par. 2, (24 Stat. at Large, 219) which provides that, on the death of an allotee of land under the treaty of June 28, 1862, with the Kickapoo Indians leaving heirs, and without having obtained the patent, the Secretary of the Interior shall cause a patent in fee simple to issue, in the name of the original allotee, the title passes from the Government to the heirs of the deceased allotee."
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> *Briggs v. McClain*, 43 Kan. 653.

> "Where a member of the Ottawa tribe of Indians, who, if she had lived until after the issuance of the patents of the land reserved for the members of the tribe, would have been entitled to receive eighty acres of land, under article 3d of the Ottawa treaty of 1862, died in

the fall of 1862, a few months after the ratification and promulgation of said treaty, held that at the time of her death *she had an inheritable estate in such land,* reserved to the members of the tribe, which descended under the laws of the state to the heirs."

Clark v. Lord, 20 Kan. 390.

The Supreme Court of this State in 1876, construed the treaty of 1861 as to the rights of the heirs of a deceased allotee, before patent was issued, and held that the allotee owned the equitable title in the allotment. The case referred to is *Oliver v. Forbes,* 17 Kan. 130, and on said page the court said:

"John Riley in his lifetime had *the equitable title to said land;* and his certificate of allotment was sufficient evidence thereon. When he died, *his wife and children succeeded to his rights by inheritance,* and not by purchase."

In the treaty of 1867 the United States was providing for the sale of all of the allotments made to the citizen Pottawatomie Indians. The tribe and the United States by treaty agreed that the father should receive the patents for his minor children and sell his allotment and collect the money therefor. The Supreme Court in the Veale case simply held that the foregoing provision in the treaty with reference to the members of the family was valid and that the conveyance by the father was legal. The other decisions cited above and dealing with Indian titles clearly show that the Indians were the equitable owners of the land covered by their allotments under the treaty of 1861. The Department of the Interior construed the treaty in 1863 as giving the Indians a vested right in the allotments from the date of the treaty. The Kindred case, reported in the 225 U. S. 582, is referred to as being in point in this case. We differ with that claim.

It has been claimed that the Delaware and Pottawatomie treaties are almost identical in language. In some respects that is true, but in the matter of the right of the railroad company to a right of way across the reservations, they are very different. In the treaty with the Delaware Indians, it was provided that the railroad company should have a right of way across their reservation without any reference to the width of the same. In the Pottawatomie treaty the railroad company was given a right of way across the reservation not to exceed one hundred feet in width. The Delawares gave the right to the United States to determine the width of the right of way, and the United States determined that it should be four hundred feet. With full knowledge of the facts the Delaware Indians permitted the railroad to be built as provided for by the act of Congress. The rights of the railroad company to the right of way across the Delaware reservation was based on the treaty and the act of Congress. The treaty gave the right of way to the railroad company and Congress determined its width.

By the Pottawatomie treaty the railroad company was given a right of way across the reservation, but its width was fixed by the treaty. If in this case we were contesting the right of way of the railroad company to the hundred feet given it by the treaty, the Kindred case would be square in point and against us. In the Kindred case no attempt was made to override the provisions of a treaty between the United States and an Indian tribe. To sustain the contention of plaintiff in this case, the Court would have to set aside the provisions of the treaty of 1861, and hold that the railroad company got title to a strip of land four hundred feet wide without extinguishing the Indian title. At the time the railroad company accepted the grant of the right of way across the reservation, it knew of the treaty of 1861, with the Pottawatomie Indians, and that the Indians had consented to a right of way not to exceed one hundred feet

in width. With that understanding the railroad company accepted the grant and built its railroad. Neither the railroad company nor the United States ever made any attempt to procure a right of way of a greater width until after the decision of the Supreme Court in the Kindred case. In some unheard of way, the railroad company now claims to own a strip of land across the reservation of the width of four hundred feet instead of one hundred feet as given them by the treaty.

In support of the contention of the plaintiff they cite the Kindred case referred to; the *Grinter v. Kansas Pacific Railroad Co.*, 23 Kan. 655, case, and the case of *Leavenworth R. R. Co. v. U. S.*, 92 U. S. 733.

In the case of *Grinter v. Kansas Pac. R. R. Co.*, at page 658, the court said:

> "The Delawares had stipulated that the Leavenworth, Pawnee and Western Railroad might have a right of way through their reservation upon compensation being paid. The United States agreed to extinguish the Indian title for the right of way of the Pacific roads as an additional aid to the enterprises, and to induce their early construction. . . . This it could do within the exact terms of the treaty of 1860, by paying the Delaware allotees just compensation therefor. . . . With this construction and interpretation of the treaty of 1860 and the act of Congress of 1862, all is harmony. The Indians are fully protected in their treaty guaranties, and the railway company is protected and secured in its right of way over the Indian lands."

In the case of the *Leavenworth Railroad Company v. United States*, 92 U. S. 733, the court said:

> "The doctrine in *Wilcox v. Jackson*, 13 Peters, 498, that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be con-

strued to embrace it, or to operate upon it, although no exception be made of it, reaffirmed and held to apply with more force to Indian than to military reservations, inasmuch as the latter are the absolute property of the government while in the former, other rights are vested."

The Kindred case, like the Grinter case, was decided upon the theory that the treaty with the Delaware Indians authorize the granting of the right of way by the United States to the railroad company.

It is claimed that the railroad company did not avail itself of any of the provisions of the treaty of 1861. Then by what right did it procure its right of way across the reservation. It is admitted that no steps were ever taken to extinguish the Indian title. It is claimed that immediately after the passage of the act of Congress of July 1, 1862, that the railroad company filed its map in the Department of the Interior showing its route. We desire to call the Court's attention to the fact that the map filed at that time designated Lawrence as the starting point and went west up the Kansas River on the north side thereof to the Republican River. It did not start at the Missouri River and go to a point in Nevada to connect with the railroad named in the act of Congress. Congress realizing that the railroad company had failed to comply with the terms of the grant on July 2, 1864, by an act of Congress, gave the railroad company another year within which to file its map in the Department designating its general route. The railroad company accepted the grant under the act of July 2, 1864, and filed its map of general location on July 1, 1865. It thereby abandoned its partial map filed on July, 1862. All the rights of the railroad company date from July 2, 1864, as against parties who acquired rights prior thereto.

It is further claimed by the plaintiff that by the act of Congress, it was contemplated that the railroad would have to be built across the Pottawatomie reservation. In that matter we agree with the plaintiff. The United States it seems had that matter in contemplation for sometime before the act of Congress was passed granting a right of way. At the time of making the treaty, the United States secured a provision to be inserted in the treaty for the benefit of the railroad company giving it a right of way one hundred feet in width across the reservation, and the railroad company must be held to have accepted that provision made in its behalf by the United States. The Indians had a right to assume, at the time the railroad was built, that the railroad company was building its road in compliance with that provision in the treaty. The plaintiff evidently so understood this and took possession of a right of way only 100 feet wide and enclosed the same by fences many years prior to the bringing of this suit.

Admissions 14 and 31 cover these matters and read as follows:

"14. The railroad, extended from mile post 62 to mile post 105 included in the third and fourth sections above mentioned, and across the lands involved in this action, was constructed during the years 1865 and 1866. It was constructed as far as Silver Lake at mile post 78 and trains were in operation to that point on March 19, 1866. That part of the land involved in this action in sections 8 and 9, township 10, range 11, is located between mile post 78 and mile post 79. The other parcels of land involved herein are located near mile post 88 and are included in the fourth section of the railroad."

"31. The plaintiff, Union Pacific Railroad Company, and its predecessors have continuously maintained a fence on each side of its track 50 feet from the center thereof through the Pottawatomie Reservation, except at stations, which was the standard for fences along its

> entire line in Kansas, and defendants and their grantors have claimed to own and have used and cultivated and been in the actual possession of all the land outside of said fences since said railroad was constructed, and have paid taxes thereon continually. The plaintiff and its predecessors have continuously returned the right of way as a whole and have paid the taxes assessed against it."

The Indians had the right to assume that the railroad company would follow the provisions of the act of Congress of July 2, 1864, and have another hundred feet of right of way condemned by the United States, if necessary, and pay them for the same if it was required for a right of way for the railroad company. By this act another 100 feet, or 200 feet in all, might have been acquired. The United States not having taken any steps to extinguish the Indian title, to more than that given by the treaty, the grantees of the Indian owners had a right to assume that the railroad company would have to condemn and pay for any additional right of way needed as provided for in the act of Congress of July 2, 1864. The railroad company has not acquired any title to any of the lands in excess of one hundred feet in width. The 300 feet of right of way involved in this action was sold by the Indian owners for their benefit. In such case the Supreme Court of the United States holds that the grantees are the owners of the land.

> "The land has remained continuously appropriated to the use of the Indians or has been sold for their benefit. It never for a moment has become a part of the public domain in the ordinary sense."
>
> *M. K. & T. R. R. v. U. S.*, 235 U. S. 40.

It was claimed in the brief of plaintiff in the court below that:

> "The grant of the right of way was complete and the government itself could not do anything to deprive the railroad company of its title to it after the company had performed its part by constructing a railroad in accordance with the terms of the act."

The trouble with the foregoing claim is that it is not supported by reason or authority. The railroad company accepted the grant subject to all of the conditions imposed therein. One was that the title of the Indians to the right of way had to be extinguished to all of the lands in excess of 100 feet in width. The United States was to take charge of and extinguish the title as required for a right of way. It contemplated a thing that might not happen. In this case it did not happen. The United States had to get the consent of the Indians to the extinguishment of the title, and that it did not do. The railroad company understood all about these matters when it built its railroad. If it wanted to know whether the title could be extinguished it should have taken steps to find out. It should have consulted with the Indians and have found out whether they would consent to a greater right of way than 100 feet in width.

> "The railroad company took its chances with the government in this particular. The latter may not deem it sound policy or for the welfare of the Indians to extinguish their title, or it might not procure their assent. . . . Knowing the title under which the Indians held this territory, the company should, when it contemplated the construction of the road have obtained some positive assurance from the Indians that they would permit the road to be built."
>
> *Atlantic & Pac. R. R. v. Mingus*, 165 U. S. 439-440.

Neither the United States or the railroad company took any steps to secure the assent of the Indians to the extinguishment of the title of the Indians to the land involved in

this action. The condition that the Indian title should be extinguished has never been complied with. That being the case no title ever passed to the railroad company.

> "It appears to us that the appellants claim stands most strongly if based upon a covenant—but, covenant or grant, the concession of the United States was dependent upon conditions that have not been fulfilled."
>
> *M. K. & T. R. R. v. U. S.*, 235 U. S. 41.

In the foregoing case the Supreme Court was passing upon a provision in a land grant to the railroad company. The grant was subject to the extinguishment of the Indian title which has not been complied with.

VI.

The Indian Title Has Not Been Extinguished to the Lands Involved in this Action, and the Title Therefore Remains in the Grantee of the Indians.

The title of the Indians to the land in question was not, and has not, been extinguished by the United States as provided in said act, nor have any steps been taken by the United States to extinguish the same.

The foregoing claim is admitted by the parties to this action. The admission appears in number 27, and is as follows:

> "It was provided by section 2 of the act of Congress of July 1, 1862, that: 'The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of the act and required for the said right of way and tracks hereinafter made.' No steps have ever been taken by the United States to extinguish the Indian titles insofar as the land described

in plaintiff's petition is concerned, or any land within the Pottawatomie Indian Reservation covered by the treaty of 1846."

It is admitted that the United States never took any steps to extinguish the Indian title to the land in controversy in this action. Under the terms of the act of Congress of July 1, 1862, and the amendments thereto, it was provided that the United States should take steps to extinguish the Indian title as rapidly as might be to all lands required for the right of way. However, it is admitted that no such steps were ever taken by the United States. The act of Congress granting the right of way when construed most favorably to the railroad company operated to convey the right of way subject to the rights of the Indians, which in this case was the title and possession. Until the title and right of occupancy of the Indians to the land in question were extinguished by the United States Government, the plaintiff had, and has, no rights therein. Under the treaty the manner, time and conditions of extinguishing the title and right of occupancy of the Indians to the land in question were exclusively matters for the consideration of the United States. The railroad company had no right to take steps to extinguish the title without consent of the United States. Such rights could not be interfered with nor put in contest by private parties. The railroad company at the time of accepting the grant knew of the treaties referred to herein, and they also knew that the treaty of 1846 gave to the Indians the title and possession to all of the lands included in the reservation. They also knew that the United States had entered into a treaty with said tribe of Indians agreeing to allot to them the land in severalty, if desired by them. Knowing the title under which the Indians held the land in question, the company should, when it contemplated the construction of the road, had obtained some positive assurance from the Indians that they were

willing to give them a right of way across said lands to the extent of two hundred feet on both sides of the railroad track. This they did not do, and therefore took it subject to the title and rights of the Indians, and therefore can only hold the one hundred feet granted to them by the treaty and accepted by them at the time of the construction of the railroad across the lands in question. The authorities cited below sustain all of the foregoing claims.

> "Similar language is used with reference to these Indians in *Holden v. Joy*, 17 Wall. 211, 242. Under these circumstances it could scarcely be expected that the United States should be called upon to extinguish, for the benefit of a railroad company, which had chosen to locate its route through this territory, a title guaranteed to the Indians by solemn treaties and which had been possessed by them for upwards of forty years with the powers of an almost independent government. . . .
>
> "With respect to the power of the United States to extinguish the Indian titles, it was observed in *Beecher v. Wetherby*, 95 U. S. 517, 525: 'It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians.' "
>
> *Atlantic and Pacific Railroad v. Mingus*, 165 U. S. 437-8.

"The railroad company took its chances with the Government in this particular. The latter might not deem it sound policy for the welfare of the Indians to extinguish their title, or it might not procure their assent. Under neither contingency would the company have the right to complain nor to set up this non-per-

formance as a defense to its own failure to build the road. Knowing the title under which the Indians held this territory, the company should, when it contemplated the construction of the road, have obtained some positive assurances from the Indians that they would permit the road to be built."

Atlantic and Pacific Railroad v. Mingus, 165 U. S. 439-440.

The act of Congress of July 1, 1862, and the act of Congress of July 2, 1864, contained the same provision with reference to the extinguishment of the Indian title to lands crossed by the right of way of said railroad. The provision in reference thereto is as follows:

"The United States shall extinguish as rapidly as may be the Indian title to all lands falling under the operation of this act, and required for the said right of way and grants hereinafter made."

Under the foregoing provision the United States promised to extinguish the Indian title to all lands falling under the grant as rapidly as may be required for the said right of way.

The United States reserved to itself the right to extinguish the Indian title and it promised to do so as rapidly as may be and when required for the right of way. Under the facts in this case, it must be assumed that there never has been a time when the United States could extinguish the Indian title to the lands in question or that the same was required by the railroad company for a right of way. The United States could not extinguish the Indian title to the lands in question without the consent of the Indian owners. It is not claimed that the Indian owners ever gave such consent. The railroad company accepted the grant subject to the foregoing provision. It knew the title the Pottawatomie Indians had to the

land in question. It knew the title to the land could not be extinguished without the consent of the Indian owners. The United States was to extinguish the Indian title as rapidly as may be when required for a right of way. The land involved in this action has never been acquired by the railroad company for a right of way. When the railroad was built, it was given a strip of land one hundred feet wide by the Pottawatomie Indians for a right of way. No more land was required by the railroad company for the operation of its railroad. No more is required at this time. Under the circumstances existing at that time, it should be presumed that the United States and the railroad company did not deem it necessary to have the Indian title extinguished to the land involved in this action. If it was not required then, it is not required now. Candidly we are at a loss to know by what right and in what manner the railroad company became the owner of the lands involved in this action. Their claim can be based only upon the proposition that the lands in question were public land and that the Indians had no right or title thereto. To sustain that claim would be to wholly ignore the treaties of 1846 and 1861, and this Court would have to ignore, in addition thereto, its own decisions and the Constitution of the United States. To do these things would be to hold that the Indians had no rights which the courts or the United States are bound to respect, and that treaties between the United States and the Indians are of no force and effect. This Court would also have to hold that the provision in the act of Congress with reference to the extinguishment of the Indian title to the lands crossed by the right of way in question was of no force and effect. That surely is not the law.

The case cited below is squarely in point on the foregoing proposition and is decisive that the Indians had title.

> "Taken literally the grant or covenant of the United States was subject to two conditions precedent. When-

ever the Indian title shall be extinguished means when and not until that occurs, and contemplates it as something that may not come to pass. The proviso attaches the further condition that if the Indian title shall be extinguished it must be extinguished in such a way that the lands become a part of the public domain. It cannot be said that 'whenever' imports that sooner or later the Indian title will and shall be disposed of. The Indians had to be considered and it could not be assumed that they would be removed to another place, as they had been removed before. It cannot be said, either, that on the face of the clause the proviso adds nothing and means only that on extinction of the Indian title the rights of the railroad shall attach as if the land were public land. . . . The land has remained continuously appropriated to the use of the Indians or has been sold for their benefit. It never for a moment has become a part of the public domain in the ordinary sense."

M. K. & T. Co. v. U. S., 235 U. S. 39, 40.

"It appears to us that the appellant's claim stands most strongly if based upon a covenant—but, covenant or grant, the concession of the United States was dependent upon conditions that have not been fulfilled."

M. K. & T. Co. v. U. S., 235 U. S. 41.
Leavenworth R. R. Co. v. U. S., 92 U. S. 743.

"This grant, however, if it took effect on these lands carried with it the obligation to extinguish the Indian right. This will be conceded, if a complete title to them were granted; but it is equally true if only the fee subject to that right pass. It would be idle to grant what could be of no practical benefit unless something be done which the grantee is forbidden, but which the grantor has power to do. . . . The grantee was prohibited from negotiating with the Indians at all; but the United States might by treaty put an end to that right. As Congress cannot be supposed to do a vain thing the present grant of the fee would be an assur-

ance to the grantee that the full title should be eventually enjoyed. This would be in effect a transfer of the possessory right of the Indians before acquiring it,—a poor way of observing a treaty stipulation."

Railroad Co. v. U. S., 92 U. S. 743.

"The Pottawatomie Nation was the owner of the possessory right of the country ceded, and all the subjects of the nation were joint owners of it. The reservees took by treaty, directly from the nation, the Indian title; and this was the right to occupy, use and enjoy the lands, in common with the United States until partition was made, in the manner prescribed. *The treaty itself converted the reserved sections into individual property.* The Indians as a nation reserved no interest in the territory ceded; but as a part consideration for the cession certain individuals of the nation had conferred on them portions of the land, to which the United States title was either added or promised to be added; and it matters not which, for the purposes of this controversy."

Doe v. Wilson, 23 How. 463.

VII.

The Indians and their Grantees Were the First to Commence Proceedings to Acquire Title to the Allotments and Have the Paramount Title Thereto.

The Indians were first in the commencement of proceedings for the acquisition of title to the lands involved in this action. The Indian tribe purchased the reservation in 1846, and paid full value therefor. In 1861, the tribe of Indians made another treaty with reference to the land involved in this action and under its provisions they finally acquired the title in fee simple by a patent from the United States. We

will call attention of the Court to the treaties and rights acquired thereunder.

The treaty of 1846 was the first step taken by the Pottawatomie Tribe of Indians in acquiring the fee simple title to the lands involved in this action. The tribe paid $87,000 in cash and ceded all their right and title to land elsewhere, to the United States. The United States after that time could not take away the rights thus acquired without the consent of the Indians. That portion of the public domain included within the reservation from that time on ceased to be public lands.

> "The words 'public lands" in legislation refer to such lands as are subject to sale or other disposal under general laws, and no other meaning will be attributed to them unless apparent from the context of, or circumstances attending the legislation."
>
> *Union Pacific Railroad Co. v. Harris*, 215 U. S. 386.

> "Indeed the intent of congress in all railroad land grants as has been understood and declared by this court again and again is that such grant shall operate at a fixed time, and shall take only such lands as at that time are public land."
>
> *Mo. Pac. Railroad Co. v. Musser-Sauntry Co.*, 168 U. S. 610.

The treaty of November 15, 1861, between the United States and the Pottawatomie Tribe of Indians, was the second step taken by the Pottawatomie Indians toward acquiring the legal title to the lands involved in this action. By the terms of said treaty it was provided that:

> "It is therefore agreed by the parties hereto that the commissioner of Indian affairs shall cause the whole of said reservation to be surveyed in the same manner as public lands are surveyed, the expense whereof shall be

paid out of the sales of lands hereinafter provided for, and the quantity of land hereinafter provided to be set apart to those of the tribe who desire to take their lands in severalty, . . . and thereupon there has been assigned, under the direction of the commissioner of Indian affairs, to each chief at the signing of the treaty, one section; to each head-man one half section; to each head of a family one quarter section; and to each other person, eighty acres of land; . . . when the assignments shall have been completed certificates shall be issued by the Commissioner of Indian Affairs for the tracts assigned in severalty, . . . and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs. Until otherwise provided such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee or lease or disposed of only to the United States or to persons then members of the Pottawatomie Tribe, and of Indian blood with the permission of the President, ... and on receipt of such certificates the persons to whom they are issued shall be deemed to have relinquished all right to any portion of the land assigned in severalty, or to a portion of the Tribe in common," etc.

Article 3 of said treaty further provided that:

"At any time hereafter when the President of the United States shall have become satisfied that any adults, being males and heads of families, who may be allotees under the provisions of the foregoing article are sufficiently intelligent and prudent to control their affairs and interests, he may at the request of such persons, cause their lands severally held by them to be conveyed to them by patent in fee simple, with power of alienation," etc.

The aforesaid treaty of 1861 gave new rights to the individual Indians that were not conferred upon them by the treaty of 1846. By the terms of this treaty the Indians who

desired to take allotments had that right conferred upon them. The treaty was signed on November 15, 1861, and ratified by the United States Senate on April 22, 1862. The first act of Congress relied upon by the plaintiff as granting it the right-of-way was not passed until July 1, 1862. The treaty further provided for the allotment of the lands in severalty and was passed and approved and took effect before the aforesaid acts of Congress became a law. At the time the act of Congress was passed, the lands included in this action were not public lands, or Indian lands which might become public lands, and the plaintiff acquired no rights thereto. The land was not subject to the disposal of Congress at that time.

The Supreme Court of the United States in the case of the *M. K. & T. Ry. Co. v. U. S.*, 235 U. S. 37, said:

> "A statute granting public lands or Indian lands which may become public lands, will not be construed as including Indian lands afterwards allotted in severalty under a treaty made immediately before the enactment of the statute, as to do so would be to charge the government with bad faith with the Indian owners of the land."

In the case of the *Leavenworth, Lawrence, Railroad v. U. S.*, 92 U. S. 733, the court said:

> "A special exception of it was not necessary because the policy which dictated them confined them to land which congress could rightfully bestow, without disturbing existing relations and producing vexatious conflicts, . . . every tract set apart for special uses is reserved to the government to enable it to enforce them. There is no difference, in this respect, whether it be appropriated for Indian or for other purposes."

Under the treaty of 1861, it was provided that an allotee should have the allotment forever, and in case of his death

it should go to his heirs. The allotee gave up his interest in the other lands upon the reservation that he might own and possess the tract of land allotted to him. He gave value for the allotment. The government recognized his rights in the other land and required him to waive his rights thereto by reason of the land to be allotted to him. In the treaty of 1861, it was provided for the sale of the surplus land on the reservation upon certain terms, and the proceeds thereof to be credited to the Indian tribe. By such provision the United States recognized the Indian tribe as the owners of the equitable title to the reservation. Had it been otherwise, the United States would have kept the proceeds of the sale of the surplus lands. All the rights of the United States in the lands on the Pottawatomie Reservation were that of a trustee or guardian.

Under the treaty of 1861, an allotee who complied with the terms of the treaty with reference to procuring a patent in fee simple had a right to such patent. In such case he became the legal as well as the equitable owner of the land. There was nothing that prevented the allotee from acquiring the fee simple title, if he complied with the treaty and possessed the necessary qualifications. In this case it must be presumed that the Indian allotees possessed the necessary qualifications under the treaty and complied with its provisions, as in each case it is admitted patents in fee simple were issued to the allotees.

> "It would be a hard rule to hold reservees under this treaty, in case of contest, were required to prove not only that the locations were made by the public officers, but that the conditions on which these officers were authorized to act, had been observed by them. Such a rule would impose a burden upon the reservees not contemplated of the treaties and of necessity leave their titles in an unsettled state. . . . It has been frequently held by this court that a grant raised the presumption

that the incipient steps required to give it validity have been taken."

Best v. Polk, 85 U. S. 118.

The allotees had as good title, to the lands allotted to them under the treaty of 1861, from the time of signing the treaty as a homesteader has who has filed his claim upon the public domain and located thereon, and who has not yet complied with all of the requirements of the law to entitle him to a patent. In either case the parties are entitled to a patent in fee simple by complying with the law or the treaty as the case may be. In the case of a homesteader, a railroad company acquires no rights as against him, where the act of Congress granting the right of way to the railroad company was passed after the homesteader filed his claim of homestead. The Supreme Court of Kansas and the Supreme Court of the United States have so held in a case brought by the Union Pacific Railroad Company against such a homesteader.

"A tract of land owned by the United States, but lawfully occupied by a settler who had filed a declaratory statement claiming a right to it under the pre-emption law, was not a part of the 'public lands" within the meaning of section 2 of the act of congress of July 1, 1862 (12 U. S. Stat. at L., p. 489), giving to certain railroad companies a right of way through the public lands, and no right with respect to such tract was thereby granted."

Railroad Co. v. Harris, 76 Kan. 255.

The foregoing case of *Railroad Company v. Harris*, 76 Kan. 255, was appealed to the Supreme Court of the United States and was affirmed.

Railroad Co. v. Harris, 215 U. S. 386.

The Pottawatomie Tribe of Indians never surrendered the title of the land acquired by them by the treaty of 1846, but step by step they kept on until they acquired the fee simple title to the land. When the patents were issued to the allotees, they became operative as of the date of the treaty of 1861. The treaty of 1861 was the commencement of the allotees to acquire the title in fee simple. The patents issued to them relafed back to the date of the treaty insofar as it was necessary to cut off intervening claimants. The treaty of 1867 had very little, if anything, to do with the title to the lands involved in this action, as some of the patents were issued before that treaty was ratified by the United States Senate in 1868. As the Court might think the treaty of 1867 material in determining the rights of the defendants in this case, we will briefly refer to it.

We will call attention to certain provisions of the treaty of 1867, between the Pottawatomie Tribe of Indians and the United States. It is our claim that the treaty of 1867 conferred no new title on the allotees other than they had by the treaty of 1861. The provisions of said treaty, insofar as they might be material, are as follows:

Section 4 of the treaty of 1867 provided that:

> "All existing restrictions shall be removed from the sale of and alienation of lands by adults who shall have declared their intention to remove to the new reservation."

Section 6 of said treaty further provided:

> "When any member of the tribe shall become a citizen under the provisions of the treaty of 1862, the families of said parties shall also be considered as citizens, and the head of the family shall be entitled to patents and the proportionate share of funds belonging to his family," etc.

Section 8 of said treaty further provided:

"Where allotees under the treaty of 1861 shall have died or shall hereafter declare, such allotees shall be regarded, for the purpose of a careful and just settlement of their estates as citizens of the United States and of the state of Kansas; and it shall be competent for the proper courts to take charge of the settlement of their estates, under all the forms and in accordance with the laws of the state as in the case of other citizens deceased."

The treaty of 1867, under the conditions named removed all restrictions upon the right of an allotee under the treaty of 1861, to alienate his allotment. The restrictions upon the right of alienation under said treaty could be removed by an allotee declaring his intention to remove to the new reservation, or, if an allotee had already deceased before that time, or should decease thereafter, all restrictions were removed upon the right of alienation as to his heirs. The treaty also gave the right to all adults, whether male or female, to sell their allotments, and further provided that the head of the family should have the patent of the members of his family, and could convey the same. The effect of said provision was to constitute the head of the family guardian of his minor children with the right to convey the minor children's allotments, and receive the payment therefore. The treaty of 1867, recognized the equitable title of the allotees to their allotments and simply removed restrictions on the right of alienation. There is nothing in this last treaty that in any manner attempts to give the allotee any new property rights in their allotment, all it does is to remove the restrictions upon the right of sale. The treaty by its very terms recognizes the allotee as owner. There is no clause in said treaty of 1867 which attempts to grant or confer to the allotees the title to the allotment made under the treaty of 1861. The treaty of 1867 confirms the title granted by the treaty of 1861.

The Indians were the first to commence proceedings for the acquisition of title to the lands involved in this action. The Indian tribe purchased the reservation in 1846, and paid therefor. In 1861 the tribe of Indians made another treaty with reference to the land involved in this action and under its provisions they finally acquired the title in fee simple by a patent from the United States. The treaty of 1846 was the first step taken by the Pottawatomie Tribe of Indians in acquiring the fee simple title to the lands involved in this action. The tribe paid $87,000.00 in cash and ceded all their rights and title to the lands elsewhere to the United States. The United States after that time could not take away the rights thus acquired by the Indian tribe without their consent. That portion of the public domain included within the reservation from that time on ceased to be public lands. Pursuant to the treaty of 1861, between the United States and the Pottawatomie Indian Tribe, allotments were to be made to the Indians desiring such allotments, and under its provisions if they complied with the same, they were to have patents in fee simple from the United States for the lands allotted to them. The Indians in the case at bar who received the allotments for the land in question, were first in the commencement for the acquisition of the title to the land in question, and their efforts were followed up and ripened into patents from the United States. When the patents were issued by the United States to the allotees, or their heirs in case of their death, the patents became operative as of the date of signing the treaty, which was November 15, 1861. The authorities cited below sustain the foregoing contention.

> "Whilst, according to previous decisions of this court, no vested right in the public lands as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have determined to

sell or donate the property. In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

Shepley et al. v. Cowan et al., 91 U. S. 331.

"A patent from the United States operates to transfer the title, not merely from the date of the patent, but from the inception of the equitable right upon which it is based. *Shepley v. Cowan*, 91 U. S. 330. Indeed, this is generally true in case of the merging of an equitable right into a legal title. Although the patents in this case were not issued until after the sales of the timber, yet when issued they became operative as of the date of the original entries."

United States v. Detroit Lumber Co., 200 U. S. 334-335.

"In *Stark v. Starrs*, 6 Wall. 402, 418, this court observes that 'the right to a patent once vested is treated by the Government when dealing with the public lands, as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants.' In *Worth v. Branson*, 98 U. S. 118, it was held that 'a party who has complied with all the terms and conditions which entitle him to a patent for a particular tract of public land, acquires a vested interest therein, and is to be regarded as the equitable owner thereof.'"

Benson Mining Co. v. Alta Mining Co., 145 U. S. 433.

VIII.

The Railroad Company Accepted Its Grant of Right of Way Under the Act of Congress of 1862 with Full Knowledge of the Provisions of the Treaty Between the United States and the Pottawatomie Tribe of Indians and Was Bound Thereby.

The grant of the railroad company was controlled by the terms of the act of Congress authorizing the grant of such aid. When the railroad company accepted the grant as tendered by the act of Congress, it took it subject to all its terms and conditions, and is estopped from saying that such terms and conditions were void or unreasonable. The railroad company had no rights outside of the grant. The provisions in the grant that the railroad company named therein, should designate the general route of its railroad, was of the essence of the contract, and the failure to comply with the same lost to it all its rights under said act. By accepting under the act of Congress of July 2, 1864, the railroad company conceded that it failed to comply with the former act. As between the United States and the railroad company, it could claim its right of way over the public domain from July 1st, 1862, but it could not make such claim against any person acquiring rights in the land crossed by the railway before July 2, 1864. The railroad company also accepted the grant subject to the provisions that the United States would take steps to extinguish the Indian title to the lands crossed by its right of way. That provision was bottomed upon the proposition that the Indians had rights in the land that it was necessary to extinguish in some manner. It is conceded that the United States never took steps to extinguish the title. Until that is done, the railway company owns only 100 feet for its right of way given to it by the treaty of 1862. Within a year before the passage of the act of Con-

gress of July 1, 1862, the United States had entered into a treaty with the Pottawatomie Tribe of Indians, and had provided therein for the benefit of the railroad company that it should have a right of way across the land 100 feet wide, and the act provided that they would extinguish the title if necessary to the extent of 400 feet. When the grant was made, the railroad company accepted the provisions of the treaty of 1861, and built their railroad in compliance with it—100 feet wide. They built a fence in compliance with the treaty and occupied the same, and never claimed anything to the contray until after the Kindred case was decided by this Court. Under the Kindred case, this Court held that the railroad company got its title through the treaty with the Delaware Indians. Judge Pollock in his memorandum decision (Trans. p. 38) said:

> "The record in this case clearly disclosed the Leavenworth, Pawnee & Western Railroad Company, and its successors in title and right constructed that part of the line over and across the Pottawatomie Indian reservation under and in compliance with the terms of the act of Congress of July 1, 1862, and amendments thereto, and that said railroad company did not accept the terms and conditions of the treaty between the government, on the one hand, and the Pottawatomie Indian tribe, on the other, of November, 1861." (Tr. p. 38.)

We cannot tell why Judge Pollock made the foregoing statement in view of the admitted facts in the case. Nowhere in the admissions in our judgment is there anything to support the above claim. Again in the opinion, on pages 38 and 39, the court said:

> "The road was constructed by the railroad company, and was accepted by the government as in full compliance of the act under which it was built without opposition from the Pottawatomie Tribe of Indians or any

member of the tribe as an allotee as portions of that reservation."

The statement is true, but the railroad company did not claim, or use, any more than the 100 feet given them by the treaty of 1861. The acts and conduct of the railroad company led the Indians to believe that the railroad company was acting under the treaty of 1861. No notice was given to the Indians to the contrary. The conduct of the Indians was not such as to mislead the railroad company concerning that matter. The railroad company accepted the right of way in accordance with the terms of the act of Congress of 1862, and were bound thereby.

"Ordinarily the termination of a railroad's right to public aid granted to it is controlled by the terms of the statute authorizing or granting such aid."

33 Cyc, 86.

"Grants of public aid to railroad companies by loaning money or bonds, or granting public lands, have also been made upon certain conditions by the national government, through acts of congress, as in the case of the 'Pacific Railroad Acts,' the rights and liabilities of the parties thereunder being controlled by the terms of such acts."

33 Cyc, 87.

"A railroad company accepting a county subscription as made by a county court accepts it as tendered by the county court, with all its terms and conditions, and is estopped from saying that such terms and conditions are void or unreasonable."

West Virginia & P. R. Co. v. Harrison County Court, 34 S. E. 787.

"This company was not mentioned in the order submitting the subscription to vote, and therefore all its

rights were born of the court's order containing this time limit, and it must take it as it is. It has no right outside of it, as it is the contract."

West Virginia & P. R. Co., v. Harrison County Court, 34 S. E. 789.

"Where the condition requires the railroad to be begun or finished before a certain date, it is held that time is of the essence of the contract, and the subscriber may be discharged from liability by a failure to comply with the condition."

1 Elliott R. R., pars. 116, 117.

It is also claimed by the plaintiff that Nadeau purchased the land involved in this action after the railroad was built. That claim is undoubtedly true. There is no doubt but that he knew the railroad had built its tracks across the land and was operating the railroad. Nadeau also knew that the treaty of 1861, between the United States and the Pottawatomie Tribe of Indians gave the railroad company a right of way across the Pottawatomie Reservation not to exceed 100 feet in width; that the railroad company at no time had demanded or occupied a right of way of a greater width than one hundred feet through the lands involved in this action; that the railroad company was occupying and had fenced the 100 feet given to it by the treaty of 1861; that the United States had promised the railroad company to extinguish the Indian title to the right of way as required by the railroad company; that the title to the lands involved in this action had not been extinguished, and that if extinguished by the United States under the act of Congress of July 2, 1864, the railroad company could only demand a right of way 200 feet in width.

Under the law the railroad company knew the title of the Indians had never been extinguished to the lands involved in

this action, and that the assent of the Indians had never been given thereto.

If the railroad company owns the title how and when did it get it? The Kindred case, reported in the 225 U. S. 582, is not in point except as to a right of way of 100 feet across the Pottawatomie Reservation. If we were claiming that the defendant, Nadeau, owned the 100 feet of right of way upon which the railroad is operating its trains at this time, then, and in that event, the Kindred case would be in point and against us. In the Kindred case the Supreme Court held that the Indians, by their treaty with the Government, consented to the right of way 400 feet in width, and the fact that the Indians permitted the road to be built without the payment of damages could not be complained of by the grantees of said Indians. There is no claim in this case that the Indians ever assented to a right of way to exceed 100 feet in width. If the Indian owners of the land in the Kindred case had claimed damages of the railroad company for the right of way across their lands before the construction of the railroad, they would have been entitled thereto. In the case at bar the Indians did not give their assent to the appropriation of their lands and therefore were not entitled to any damages. When the title to the land involved in this action is extinguished as provided by law the owners of the land will be entitled to the damages caused thereby.

IX.

The Railroad Company Lost all of Its Rights as Against Parties Acquiring an Interest by Its Failure to File Its Map of General Location with the Department of the Interior Within Two Years from July 1, 1862.

The act of Congress of July 1, 1862, gave the railroad company two years from that date to designate its general route, which it failed to do within the time designated, and the act

of Congress of July 2, 1864, attempted to give said railroad company one year from that date within which to designate the general route of said railroad. The last act of Congress could not renew any rights to the railroad company which it had lost by its failure to comply with the first act, except as against the United States, but it would not have that effect as against a person acquiring rights in the land before the passage of the last act.

Admissions numbered 23 and 24 contain the admissions that the passage of the acts of Congress referred to above were on the dates named, and they also contain the provisions with reference to filing the map of definite location and the general route of the railroad as stated above.

In admission number 25 the following appears:

> "That the map of the general route of the Union Pacific Railroad Company, Eastern Division, required by the aforesaid section (Section 5 of act of Congress, July 2, 1864), was not prepared until July 23, 1865, by said company, and was not filed in the general land office until the 1st day of July, 1865," etc.

Admission number 26 contains the following:

> "The Union Pacific Railway Company, Eastern Division, filed its map of definite location on the 11th day of January, 1866, and the line as shown by that map passed through the land involved in this action."

The act of Congress of July 1, 1862, gave the railroad company two years within which to file its map of the general location of its railroad. On the night of July 1, 1864, that right expired by lapse of time. The two-year limit was up on that date, and the railroad company lost all of its rights and interest in said grant. The authorities are unanimous in holding when an act is to be performed within a given time that the first day is excluded and the last day in-

cluded. In applying that rule to the grant of July 1, 1862, the rights of the railroad company expired at midnight on July 1, 1864. We call this Court's attention to the following authorities:

> "Now if we exclude the first day in the present case, to wit, April 28, 1885, which was the day on which the judgment was rendered then the year within which the case is to be brought to this court would commence on April 29, 1885, and it would not end until the last moment of April 28, 1886; hence under the civil code, it is clear that this case was brought to this court within proper time."
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> *Commissioners of Smith Co. v. Labore*, 37 Kan. 480, 483.

> "The judgment having been rendered on the 12th day of April, 1882, the one year after the judgment commenced to run on the 13th day of April, 1883. The motion for a new trial not having been made or filed until on the 13th day of April, 1883, it was not made within one year after the judgment and so not within the time limited by the statute."
>
> *Pugh v. Reat*, 107 Ill. 440, 443.

> "Accordingly where leases provided that the rents should be paid semi-annually on the first days of May and November, and that if any installment should remain unpaid for one month from the time it should become due, all of the rights and privileges secured to the lessees should cease and determine, etc., the one month from the 1st day of May, within which the payment of the rent due on that day was to be made to prevent a forfeiture, expired on the first day of June following."
>
> *Sheets v. Selden's Lessee*, 2 Wall. (U. S.) 177.

The act of Congress of July 1, 1862, gave certain railroads a right of way four hundred feet in width across the State

of Kansas, from the Missouri River west, provided the railroad company accepted the grant and filed its map of the general route of said road within two years from that time. The railroad company accepted the grant but failed to designate the general route of said railroad within the time specified in said act. The grant of the railroad company was controlled by its terms authorizing the granting of such aid. When the railroad company accepted the grant as tendered by the act of Congress, it took it with all its terms and conditions, and it is estopped from saying that such terms and conditions were void or unreasonable. The railroad company had no rights outside of the grant. The provision in the grant that the railroad company named therein should designate the general route of its railroad was of the essence of the contract, and the failure to comply with the same lost to it all its rights under said act. The railroad company accepted the grant of the right of way under the act of Congress of July 2, 1864, and its rights with reference to the defendant in this case date from that time. By accepting under the act of Congress of July 2, 1864, the railroad company conceded that it failed to comply with the former act. As between the United States and the railroad company it could claim its right of way over the public domain from July 1, 1862, but it could not make such claim againt any person acquiring rights in the land crossed by the right of way before July 2, 1864.

The railroad company also accepted the grant subject to the provision that the United States would take steps to extinguish the Indian title to the lands crossed by its right of way. That provision was bottomed upon the proposition that the Indians had rights in the land that would be necessary to extinguish in some manner. It is conceded that the United States never took steps to extinguish the title. Until that is done the railway company owns only one hundred feet for its right of way given to it by the treaty of 1861.

It may be claimed by the plaintiff that it did not lose its rights under the act of 1862, by reason of its failure to file a map designating its general route with two years, because it filed a map on the 4th day of July, 1862, designating its general route from Lawrence west across the Pottawatomie Indian Reservation and on west near the western line of Kansas. The filing of the map referred to above was not a compliance with the acts of Congress and it was not so considered by the United States. The act of Congress of July 2, 1864, was bottomed on the proposition that the railroad company had failed to comply with the act of Congress of July 1, 1862, and the railroad company was given another year to file such map. The railroad company accepted the grant under the act of July 2, 1864, and filed its map thereunder designating its general route from the Missouri River west. By said acts the railroad company abandoned its first map and lost all rights thereunder.

X.

An Amendment to an Act of Congress Gives to the Portions Retained No Further Force and Effect than Existed at the Time of the Amendment.

The act of Congress of 1864 was enacted on the second day of July, two years and one day after the passage of the act of July 1st, 1862. The act of Congress of July 2, 1864, is bottomed on the proposition that the railroads named in the act of 1862 failed to comply with said act with reference to filing a map designating the general route of said railroad as provided in said act. The rights of the railroad company to the land in question should be construed as though the act of July 2, 1864, was the first act passed upon that subject. If after the act of Congress of July 1, 1862, a citizen of the United States should have filed upon a homestead which was

crossed by the right of way of said railroad, the rights of the homesteader would be subject to the rights of the railroad company to comply with said act within the time specified therein, but if the railroad company failed to comply with said act of Congress within two years, its prior right to the right of way would be lost on the last day of said two years, and Congress would not thereafter have the right as between said homesteader and the railroad company to revive the rights of said railroad and make them prior to the rights of the homesteader.

After the railroad company lost its rights, Congress had no power to reinstate them as against parties having acquired vested rights in the meantime. On the other hand, the later act of Congress would be valid and binding between the United States and the railroad company from the time of the enactment of the first act of Congress.

> "This is apparently all the change the legislature desired to make. That part was abrogated. The other portions remained untouched and unaffected by the fact that they were republished. The amendment, therefore, gave to the portions retained no force of effect further than existed prior to the amendment."
>
> *Brandup v. Britten*, 92 N. W. 452.

In connection with the foregoing claim we desire to call the Court's attention to the fact that all of the allotments were made and the report of the same was on file with the Commissioner of Indian Affairs prior to the 2nd day of July, 1864. The foregoing fact is admitted. If our contention is right, the Indians surely had a vested right at that time.

XI.

By the Act of Congress of July 2, 1864, the Railroad Company Was for the First Time Given the Right to Build Its Road on the North Side of the Kansas River, and Its Rights to a Right of Way Date from that Time.

The act of Congress of 1862 gave the railroad company a right of way on the *south* side of the Kansas River from the Missouri River west to a certain point, while the act of Congress of July 2, 1864, permitted the railroad company to build its railroad on the *north* side of the river if it deemed advisable. Section nine of the act of Congress of 1862 provides, among other things, as follows:

> "And be it further enacted that the Leavenworth, Pawnee and Western Railroad Company of Kansas, are hereby authorized to construct a railroad and telegraph line from the Missouri River at the mouth of the Kansas River on the south side thereof so as to connect with the Pacific Railroad of Missouri to the aforesaid point on the one hundredth meridian of longitude west from Greenwich as herein provided," etc.

Admission number 27 contains the following:

> "By section 12 of said act of July 2, 1864, it was provided that the railroad company might build its railroad on the opposite side of the Kansas River from Lawrence and Topeka, if deemed advisable."

Reading the two sections and construing them together, it is plain that the first act of Congress gave the railroad company the right to construct its railroad on the south side of the Kansas River, while the later act gave the railroad company the right to construct its railroad on the opposite side of the river, if the railroad company deemed it advisable.

At the time when the first act of Congress was passed, Topeka and Lawrence were located on the south side of the Kansas River, and it undoubtedly was the intention of the law-makers that the railroad should be so constructed as to run through said cities. The act of Congress of 1864, for the first time gave the railroad company permission to build its railroad on the opposite side of the river from Lawrence and Topeka. If that construction be not placed upon the two acts, then the later act means nothing when it provides the railroad company may build its railroad on the opposite side of the river from Lawrence and Topeka.

If our contentions are right and the act of Congress of 1864 gave the railroad company the right to build its railroad on the opposite side of the Kaw River from Lawrence and Topeka, then the railroad company had no rights in the land in question until after the passage of said act of Congress. At that time the allotments had all been made to the members of the tribe, and were in the hands of the Secretary of the Interior for approval. At the time that act was passed, the Indians were all in the possession of their allotments and in the case at bar the Indians were living upon them, and had made improvements thereon. Under such circumstances the lands in question were not public lands. In addition to the foregoing claim, we desire to call the Court's attention to the fact that if the railroad company lost its right under the act of 1862, by failing to comply with its requirements with reference to designating its general route, its rights accrued under the act of 1864, and should be measured as of that time.

> "Any possible rights of the railroad company in this land commence with the act of July 3, 1866, for while the acts of 1864 and 1866 were in amendment of the act of 1862, yet the route prescribed by the acts of 1862 and 1864 was far to the east of this land, and only by

the act of 1866 was the company authorized to construct a road through or near it."

Union Pacific Railroad Co. v. Harris, 215 U. S. 389.

XII.

The Grant of the Right of Way of the Plaintiff Did Not Take Effect Until July 2, 1864.

In reply to its claim that the grant of the right of way was *in praesenti* and related back to the date of the act of Congress of July 1, 1862, we do not dispute that proposition with reference to public lands. As against the claim of the defendants its right dates from July 2, 1864. Under the act of Congress of July 1, 1862, the railroad company was given two years within which to designate its general route and file a map of the same, with the Secretary of the Interior. This it did not do. On the contrary it filed in 1862 a map of its general route only for a short distance. It began nowhere and ended nowhere. It commenced at Lawrence and went west on the north side of the Kansas River to the Republican River, and thence up that river toward Nebraska. By the act of July 1, 1862, it was the duty of the railroad company to file its map of general location from the Missouri River west on the south side of the Kansas River through Lawrence and Topeka and on west to a point in Nevada to connect with a railroad named therein. Congress realized that the railroad company had not complied with the act of Congress of July 1, 1862, requiring it to designate its general route and file a map thereof with the Secretary of the Interior within two years, and Congress attempted to give the railroad company another year within which to designate its general route and file its map. The railroad company commenced over again after the act of Congress of July 2, 1864,

and in compliance therewith it prepared on June 23, 1865, its map of general location, and filed the same in the Department of the Interior on July 1, 1865, the last day given it to file the same. The general route of the right of way as indicated by said map did not go up the Republican River as the former one did and it also commenced at the Missouri River as required by the act of Congress. The last map was accepted by the Secretary of the Interior and no further attention was paid to the first map filed in 1862. It is the claim of the defendants that the treaty of November, 1861, gave the allotees a present grant and right to the land allotted to them as of the date of the treaty of 1861, and when the patents were issued they related back to the date of the treaty.

> "The treaty in this case is the source of Indian title; the location is intended to give identity to the land granted; the two together, the treaty and location, constitutes the title. The treaty being the source of the title, must be treated as the substantial part of the transaction, to which the title itself will have relation when completed by a location of the land."
>
> *McAffee v. Lynch*, 26 Miss. 259.

> "The treaty itself operated as a grant of land to each of the several reservees, which became perfect when the land was located under the direction of the president of the United States, and no patent was necessary to perfect title."
>
> *Stockton v. Williams*, 1 Doug. 546.
> *Jones v. Meehan*, 175 U. S. 21.

If the treaty gave the allotees any rights whatever, they were paramount and superior to the rights granted to the railroad company under either act of Congress referred to. The only way the railroad could have secured any rights su-

perior and paramount to the rights of the allotees, would be for this Court to hold that the reservation and the allotments were public lands.

XIII.

Indian Treaties Made Prior to March 3, 1871, Were Valid and Binding Between the United States and the Indian Tribes.

The courts of this country are bound to uphold treaties of the character referred to herein. By the Constitution of the United States, such treaties when regularly entered into are the supreme law of the land. These treaties were duly entered into and they should be recognized by this Court as valid and binding, between the United States and the Indian tribe, at the time the act of Congress of July 1, 1862, was passed granting to certain railroads a right of way. At no time has Congress or the United States attempted to repudiate either treaty above referred to. The Pottawatomie Tribe of Indians bought the tract of land in good faith and paid for it in accordance with the terms of the treaty. By so doing said tribe became at least the equitable owner of the land and the United States has no right to take the land from the tribe without its consent and give it to a railroad company. Many times the courts of this country have passed upon the validity of Indian treaties made before the year 1871, and in each and every case they have been held valid and binding between the parties. We call attention to authorities in support of the foregoing claims.

> "The admirable exposition of the law arose in a case affecting a treaty with Mexico, and the same principle must govern in our courts in regard to a treaty with an Indian nation. The latter is as much the supreme law as the former. If our government solemnly pledges its

faith by treaty, with Indian tribes, it must ever be held as sacred and binding as if it were plighted to civilized nations. To maintain treaties, especially with the weak, is for the glory of a nation because it redounds to its honor and prosperity. To break them is to violate all law, and all faith and all honor. Carthage has come down to us, through the long line of the centuries as a people characterized by 'Punic faith.'"

Uhrig v. Garrison et al., 2 Dakota, 98.

"No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty, but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

Sec. 2079 of the Revised Stat. of U. S.

The Supreme Court of the United States, in the case of *Ware v. Hyalton*, 3 Dall. 199, says:

"Here is a treaty, the supreme law, which overrules all state laws upon the subject, to all intents and purposes. To effect the object intended, there is no want of proper and strong language, there is no want of power; the treaty being sanctioned as the supreme law by the constitution of the United States, which nobody pretends to deny to be paramount and controlling to all state laws, and even state constitutions, wheresoever they interfere or disagree."

There can be no doubt that the United States before 1871 could have entered into treaty relations with an Indian tribe, and that the treaty provisions would be binding alike, both upon the Government and the Indians, to the same extent that they would have been in case of a treaty made with one of the civilized nations. Thus in the case of *Worchester*

v. Georgia, 6 Pet. 515, Chief Justice Marshall, in speaking of the treaty relations with these Indian tribes, says:

> "The very term 'nation,' so generally applied to them, means a people distinct from others. The constitution, by declaring treaties already made, as well as those to be made to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having each a definite and well-understood meaning. We have applied them to the Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense."
>
> *In re Race Horse*, 70 Fed. 606, 607.

Judge Pollock, in his memorandum decision, simply ignores the treaties of 1846 and 1861. He does not give them any force and effect. He holds the lands, embraced within the said treaties, to be public lands. In other words, Indian treaties do not give the Indians, who entered into them, any property rights that the United States is bound to respect. That cannot, and should not, be the law.

XIV.

The Decision of the Court Below Disregards the Treaty of 1861 and the Provisions of the Two Acts of Congress, and Cannot Be Maintained.

The treaty of 1861, between the United States and the Pottawatomie Tribe of Indians, provided that the railroad company should have a right of way 100 feet in width; that the allotees should have the lands upon which they were living at that time, and that they should have title in fee

simple by complying with its terms. The decision of the court below ignored the Indian title to the lands involved in this action. It also ignores the rights of the Indians under the provisions of both of the treaties. The decision is based on the proposition that the lands involved in this action were public lands on July 29, 1862, when the act of Congress was passed granting the right of way. In other words, the Pottawatomie reservation was subject to disposal by Congress at the time without the consent of the Indians, and that the treaties conferred no rights on the Indians that the United States was bound to respect. Such a holding would be a breach of good faith with the Indians.

> "A statute granting public lands, or Indian lands which may become public lands, will not be construed as including Indian lands afterward allotted in severalty under a treaty made immediately before the enactment of the statute, as to do so would be to accuse the government of bad faith with the Indian owners of the land."
>
> *M. K. & T. Railroad Co. v. U. S.*, 235 U. S. 40.

> "The legislation which reserved it for any purpose excluded it from disposal as the public lands are usually disposed of; and this act discloses no intention to change the long continued practice with respect to tracts set apart for the use of the government or of the Indians. As the transfer of any part of an Indian reservation secured by treaty would also involve a gross breach of the public faith, the presumption is conclusive that Congress never meant to grant it."
>
> *Leavenworth, etc., R. R. Co. v. U. S.*, 92 U. S. 742.

The holding of the court below, that the treaties did not confer any rights on the Indians that Congress was bound to respect, was contrary to the decisions of this Court and the Constitution of the United States. The decision of the

lower court should not be upheld by this Court as the law is to the contrary.

> "If our government solemnly pledges its faith by treaty, with Indian tribes, it must be held as sacred and binding as if it were pledged to a civilized nation. . . . To break them, is to violate all law and all faith and all honor."
>
> *Uhrig v. Garrison*, 2 Dakota, 98.

> "Here is a treaty, the supreme law, which overrules all state laws upon the subject, to all intents and purposes. To effect the object intended, there is no want of proper and strong language, there is no want of power; the treaty being sanctioned as the supreme law by the constitution of the United States, which nobody pretends to deny to be paramount and controlling to all state laws, and even state constitutions, wheresoever they interfere or disagree."
>
> *Ware v. Hyalton*, 3 Dall. 199.

Both acts of Congress recognized the Indian title to Indian reservations, through which a right of way was being granted, and each act provided that the United States would extinguish the Indian title as rapidly as may be necessary for the use of the railroad company. The acts of Congress by their very terms recognized the title of the Indians to the land, and that the same could not be extinguished without the consent of the Indians. The plaintiff in this case admits that the United States never took any steps to extinguish the title of the Indians to the lands in question. The railroad company by accepting the grant took the same subject to the title of the Indians being extinguished by the United States. The railroad company can not ignore that provision. The decision of the court below gave no force or effect to the foregoing provisions of the act of Congress. That holding was contrary to the decisions of this Court.

"It appears to us that the appellant's claim stands most strongly if based upon a covenant—but, covenant or grant, the concession of the United States was dependent upon conditions that have not been fulfilled."

M. K. & T. R. R. v. U. S., 235 U. S. 41.

"The railroad company took its chances with the government in this particular. The latter may not deem it sound policy or for the welfare of the Indians to extinguish their title, or it might not procure their assent. . . . Knowing the title under which the Indians held this territory, the company should, when it contemplated the construction of the road have obtained some positive assurance from the Indians that they would permit the road to be built."

Atlantic & Pac. R. R. Co. v. Mingus, 165 U. S. 439-440.

The decision of the court below may have been based on the ground of estoppel. No such claim was made by the plaintiff in its pleading, admission or evidence. When a party relies on an estoppel as a basis of relief, the party must plead the acts and conduct of the other party which has mislead him to his injury. A party to be estopped must have knowledge of the fact that his conduct is misleading the other party. No such evidence was offered upon the trial. There was no showing or claim that the railroad company at any time claimed more than a 100-foot right of way until a short time before this action was brought and at that time their claim was resisted by the defendants who were the grantees of the Indian allotees.

On page 17 of the transcript appears admission of fact 31, which is as follows:

"The plaintiff, Union Pacific Railroad Company, and its predecessors have continually maintained a fence on each side of its track 50 feet from the center thereof

> through the Pottawatomie Reservation, except at stations, which was the standard for fences along the entire line in Kansas, and defendants and their grantors have claimed to own and have used and cultivated and been in the actual possession of all of the land outside of said fence since said railroad was constructed, and have paid taxes thereon continually."

In view of the foregoing admission, it would appear to us that there is no basis for a claim that the railroad company was in any way misled by the acts or conduct of the defendants or their grantors to their injury. The railroad company was at no time led to believe that the defendants or the grantors intended that the right of way should be of a greater width than 100 feet.

XV.

Why Should there be a Difference Between a Party Who Has Filed a Pre-emption Entry on the Public Domain and an Indian Allotee Under the Treaty of 1861?

Under the act of Congress of July 1, 1862, it was provided as follows:

> "That the right of way through public lands be and the same is hereby granted to said company for the construction of said railroad and telegraph line; and the right, power and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber," etc.

Under that provision this Court held that a tract of land owned by the United States but lawfully occupied by a settler, who has filed a declaratory statement, claiming a right

to it under the pre-emption law was not a part of the public lands under the act of Congress of July 1, 1862.

Railroad Co. v. Harris, 215 U. S. 386.
Railroad Co. v. Harris, 76 Kan. 255.

The lands in question in this action were purchased from the United States by the Pottawatomie Tribe of Indians in 1846, as shown by the treaty of that date. In 1861 the Indians who were allotted the lands involved in this action, waived their rights in the lands generally in the Pottawatomie reservation by the treaty of 1861, that they might receive allotments in severalty. The right to allotments were guaranteed them by said treaty between the United States and the Pottawatomie Tribe of Indians. By the terms of the treaty the Indians were to receive allotments as of the date of signing the treaty, which was a grant *in presenti*. They were to have allotted to them the land upon which they were living at the time, and upon which they had their improvements. They received their allotments in accordance with the provisions of the treaty. They were given the land upon which they were living at the date of signing the treaty. They afterwards received patents in fee simple for the land in compliance with the terms of the treaty. The allotee in each case lived on the lands from the date of signing the treaty until the patent in fee simple was issued by the Government. The allotees surely had as good a title to the lands alloted to them as the party who had filed a declaratory statement claiming a right under the pre-emption laws to the public domain. Why make a difference between the rights of the two?

We therefore pray that the judgment of the lower court be reversed, and that this Court direct the lower court to enter judgment in favor of the plaintiffs in error.

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INDEX TO CASES CITED AND DISCUSSED.

Clizer v. Forbes, 17 Kan. 130 5

In the Supreme Court of the United States

OCTOBER TERM, 1919

No. 119

JOSEPH E. NADEAU, MARTHA NADEAU, HIS WIFE, ET AL., PLAINTIFFS IN ERROR,

vs.

UNION PACIFIC RAILROAD COMPANY, DEFENDANT IN ERROR.

REPLY BRIEF OF PLAINTIFFS IN ERROR

BRIEF OF ARGUMENT.

It is agreed between the parties to this appeal that the main question for the decision of this court is: Were the lands involved in this action public lands within the meaning of the Acts of Congress of July 1, 1862, and July 2, 1864, and the Pottawatomie Treaty of 1861, in view of the fact that at the time said Acts of Congress were passed, said lands by the treaty between the United States and the Pottawatomie Tribe of Indians had been assigned to the grantors of the plaintiffs in error, and said treaty also provided that the railroad company should have a right of way not to exceed one hundred feet in width across this reservation.

It is the claim of the defendant in error that the lands in question were public lands at the date of the passage of the two Acts of Congress referred to above. On the other hand, it is the claim of the plaintiffs in error that the lands were not public lands at that time because they had been assigned by the express terms of the Treaty of November 15, 1861, to the Indian grantors of the plaintiffs in error, subject only to a right of way not to exceed 100 feet in width.

It has been decided by this court, and by the Supreme Court of the state of Kansas, in construing the aforesaid acts of Congress granting a right of way thereunder, that where a settler had filed a declaratory statement under the preemption laws of the United States, prior to the date of the first Act of Congress above mentioned, granting a right of way to the railroad company, the lands filed upon were not public lands within the meaning of said Acts of Congress granting the right of way, and that his rights were paramount to the rights of the railroad company.

> "A tract of land owned by the United States, but lawfully occupied by a settler who had filed a declaratory statement claiming a right to it under the pre-emption law, was not a part of the 'public lands' within the meaning of section 2 of the act of Congress of July 1, 1862 (12 U. S. Stat. at L., p. 489) giving to certain railroad companies a right of way through the public lands, and no right with respect to such tract was thereby granted."
>
> *Railroad Company v. Harris*, 76 Kan. 255.
> *Railroad Company v. Harris*, 215 U. S. 386.

This being the established rule of law of this court, we now call the court's attention to the claim of title of the Indian allottees and patentees who were the grantors of the

plaintiffs in error at the time when the act of Congress of July 1, 1862, was enacted.

At that time the Indians, from whom plaintiffs in error obtained title, were living on the lands in question, had their improvements thereon made prior to the date of the treaty of November 15, 1861, and by the terms of the treaty it was agreed that they should have allotted to them the lands upon which they were living at the time and upon which they had their improvements. In connection therewith, we desire to call the court's attention to admission 21, set out on page 12 of the transcript, as follows:

> "That in each case the allotments involved in this action were allotted to members of said tribe of Indians living upon the same and having improvements thereon when the treaty was made on November 15, 1861, and that said Indians continued to live upon said allotments from said date until the allotments were approved by the Secretary of the Interior."

And in connection therewith we desire to further call attention to admission 29, which appears on page 17 of the transcript, as follows:

> "Patents were duly issued to the lands involved herein. Such patents made no reservations of a right of way. The defendants claim title through mesne conveyances under said treaty of 1861 and the allotments made thereunder and the patents issued in accordance therewith and continuous occupancy and possession of said lands."

In article 2 of the treaty between the United States and the Pottawatomie Tribe of Indians, among other things it was provided as follows:

> "And thereupon there shall be assigned, under the direction of the Commissioner of Indian Affairs, to each

chief at the signing of the treaty, one section; to each headman, one-half section; to each other head of a family, one-quarter section; and to each other person eighty acres of land, to include in every case, as far as practicable, to each family, their improvements and reasonable portions of timber, to be selected according to the legal subdivision of the survey. When such assignment shall have been completed, certificates shall be issued by the Commissioner of Indian Affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned, respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs." (Tr. p. 11.)

The Court will notice that the treaty provides that the assignments shall be made in severalty "at the signing of the treaty," and also "that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs."

By the terms of the foregoing it was intended that the grants in severalty to the individual Indians who received allotments should be one *in presenti* and date as of the date of signing the treaty, which was November 15, 1861, at which time the act of Congress had not been thought of. It was not left to be determined by law when the rights of the allottees should attach; that was settled by the treaty itself. (See authorities on pp. 29 *et seq.* of our original brief.)

By admission 19, which appears on pages 11 and 12 of the transcript, it is agreed by the parties to this action that the question of when the rights of the prospective allottees attached under the foregoing provisions of said treaty was submitted to the Commissioner of Indian Affairs, who held, on January 19, 1863, among other things, as follows:

"It follows as a consequence of this construction that in case any such person has deceased since the date of the treaty (that being the time the rights of such person accrued) his or her heirs as such will be entitled to receive the certificate of allotment to which such deceased person would have been entitled had he or she continued to live."

Under the provisions of the treaty aforesaid, the Indians were the equitable owners of said allotments, the United States holding only the legal title in trust for them. By the terms of said treaty, it was provided that the Indians who received said allotments, by complying therewith, would get the fee simple title; and it is agreed in this case that they did comply with the provisions of the treaty and got such title from the United States, by patents in fee simple. The Indian allottees in this case were the first to take steps to acquire title to the lands involved in this action and their title dates back to the date of the signing of the treaty, November 15, 1861.

There is no doubt that the Indians who received the allotments were the equitable owners of the title to the land. This has been so held many times by the courts. The Supreme Court of Kansas in construing the aforesaid treaty so held.

"John Riley in his lifetime had the equitable title in said land; and his certificate of allotment was sufficient ~~allotment~~ evidence thereof. When he died, his wife and children succeeded to his rights by inheritance, and not by purchase." Oliver v. Porter, 17 Kan. 130.

. . . . . .

"Where a member of the Ottawa tribe of Indians, who, if she had lived until after the issuance of the patents of the land reserved for the members of the tribe, would have been entitled to receive eighty acres

of land under Art. 3 of the Ottawa Treaty of 1862, died in the fall of 1862, a few months after the ratification and promulgation of said treaty, held that at the time of her death she had an inheritable estate in such land reserved to the members of the tribe, which descended under the laws of the State to the heirs."

Clark v. Lord, 20 Kan. 390.
Briggs v. McClain, 43 Kan. 653.

"For all practical purposes, the court added, they owned it as the actual right of possession, the only thing they deemed of value, was secured to them by treaty, until they should elect to surrender it to the United States."

Bardon v. Northern Pac. R. R., 145 U. S. 543.

In the case of *U. S. v. Paine Lumber Co.*, 206 U. S. 467, this court considered the question of the title to lands of the Indian allottees under the Stockbridge and Munsie treaty of 1856. That treaty in its provisions relative to the allotment of land to the Indians corresponds very closely to the Pottawatomie treaty under consideration. The terms of the treaty are substantially given in the opinion of the court on page 471, as follows:

"After survey into the usual subdivisions the council of the tribes, under the direction of the superintendent, shall 'make a fair and just allotment among the individuals and families of their tribes,' in eighty-acre tracts to heads of families and other classes named, and forty acres to others. The allottees 'may take immediate possession thereof, and the United States will thenceforth and until the issuing of "patents" hold the same in trust for such persons'; certificates are to be issued 'securing to the holders their possession and an ultimate title to the land;' but 'such certificates shall not be assignable, and shall contain a clause expressly prohibiting the sale

or transfer by the holder' of such land. After ten years, upon application of the holder and consent of the council, 'and when it shall appear prudent and for his or her welfare, the President of the United States may direct that such restriction on the power of sale shall be withdrawn and a patent issued in the usual form.' In the event of the death of an allottee without heirs, before patent, the allotment was not to revert to the United States, but to the tribe for disposition by the council. It is further declared (art. 11): 'The object of this instrument being to advance the welfare and improvement of said Indians, it is agreed, if it prove insufficient, from causes that cannot now be foreseen, to effect these ends, then the President of the Unitd States may, by and with the advice and consent of the Senate, adopt such policy in the management of their affairs as in his judgment may be most beneficial to them; or Congress may, hereafter, make such provisions of law as experience shall prove necessary."

The court held that this allotment conveyed more than the mere right of possession. We quote from the opinion:

"It is contended that the right of the Indians is that of occupation only, and that the measure of power over the timber on their allotment is expressed in *United States v. Cook*, 19 Wall. 592. We do not regard that case as controlling." (p. 472.)

. . . . . .

"If such were the title in the case at bar, such would be the conclusions, but such is not the title. We need not, however, exactly define it. It is certainly more than a right of mere occupation. The restraint upon alienation must not be exaggerated. It does not of itself debase the right below a fee simple. *Schly v. Clark*, 118 U. S. 250. The title is held by the United States, it it true, but it is held 'in trust for individuals and their heirs to whom the same were allotted.' The considera-

> tions, therefore, which determined the decision in *United States v. Cook* do not exist. The land is not the land of the United States, and the timber when cut did not become the property of the United States." (p. 473.)

Judge Seaman of the Circuit Court, whose opinion was approved by this court in considering the above case (154 Fed. 263, 265) when before him, used the following language:

> "Under the terms of this treaty, the policy of earlier treaties, to reserve to the Indians 'to be held as other Indian lands are held'—a mere right of occupancy—was changed to intend an ultimate title in fee simple. Pending the patent, while the legal title is in the United States, the allottee was vested with the equitable title contemplated by the treaty (*Crews v. Burcham*, 1 Black, 352, 356, 17 L. Ed. 91), unless modified by act of Congress, or by concurrent action of the President and Senate, if therein subject to modification. The provision in restraint of alienation meantime 'is not inconsistent with a fee-simple estate.' (*Libby v. Clark*, 118 U. S. 250, 255, 6 Sup. Ct. 1045, 30 L. Ed. 133.) Assuming as suggested in the argument (but not so ruling), that the provision for title to go to the tribe in default of heirs would turn it into a base or qualified fee, the allottee living 'has the same rights and privileges over his estate as if it were a fee simple' (11 Am. & Eng. Ency. of Law (2d ed.), 369, and citations), and is not liable for waste (*Id.* 374). *See U. S. v. Reese*, 5 Dill. 405, Fed. Cas. No. 16,137."

See, also, *Francis v. Francis*, 203 U. S. 233, and cases cited on pages 29-32 of our original brief.

It should not be overlooked in this connection that the United States by the solemn treaty with the Pottawatomie tribe made on November 15, 1861, had agreed to make the

allotments to the Indians desiring the same as of the date of the signing of the treaty and before the Act of Congress was passed. In connection with the above quoted facts we desire to call attention to the case of *M. K. T. R. R. Co. v. U. S.*, 235 U. S. 37. The railroad company accepted its grant of right of way under the act of Congress of 1862 with full knowledge of the provisions of the treaty with the Indians and their rights thereunder, and that Congress recognized title in the Indians, which title had to be extinguished before the company could get a right of way in excess of 100 feet.

> "The railroad company took its chances with the government in this particular. The latter might not deem it sound policy for the welfare of the Indians to extinguish their title, or it might not procure their assent. Under neither contingency would the company have the right to complain nor to set up this nonperformance as a defense to its own failure to build the road. Knowing the title under which the Indians held this territory, the company should, when it contemplated the construction of the road have obtained some positive assurance from the Indians that they would permit the road to be built."
>
> *Ry. Co. v. Mingus*, 165 U. S. 439-440.

It is admitted that the United States never took any steps to extinguish the Indian title for any right of way other than that provided in the treaty, which was not to exceed 100 feet.

> "It cannot be said, either, that on the face of the clause the proviso adds nothing and means only that on extinction of the Indian title the rights of the railroad shall attach as if the lands were public land. . . . It appears to us that the appellant's claim stands most strongly if based upon a covenant—but, covenant or grant, the concession of the United States was dependent upon conditions that have not been fulfilled."
>
> *Ry. Co. v. U. S.*, 235 U. S. 39, 41.

It is the claim of the defendant in error that it took under the grant and not under the treaty. (See its brief, page 20, *et seq.*) Yet it claims that the Kindred case, decided by this Court, is conclusive in its favor. The Kindred case held that the grant of the right of way under the act of 1862 did not stand alone but was to be taken in connection with the treaty provisions. If that be so, then the position of the defendant in error cannot be sustained. If the grant must be taken in connection with the treaty with the Pottawatomie Indians, then the Defendant in Error has a right of way only 100 feet wide. This is what we contend.

In this connection we call attention to the language in the Kindred case on that subject.

> "It therefore is not as if Congress had undertaken to grant a right of way through these lands without the assent of the assignees or any provision for compensating them. As respect these lands, the right of way section in the act of 1862, did not stand alone, but was to be taken in connection with the treaty provision. The two together, meant the right of way was granted not merely by the United States, but with the assent of the Indian assignees, and that the latter were to be jointly compensated."
>
> *Kindred v. Ry. Co.*, 225 U. S. 595.

> "It results that the sole irregularity in respect of the acquisition of the *right of way contemplated by the treaty provision and the statute, taken together*, was the failure to make compensation therefor to the Indian assignees when the railroad was constructed or until after the lands had been sold for their benefit to the remote grantor of the appellants." (Italics are ours.)
>
> Id. p. 596.

The Kindred case was decided upon the proposition that the Delaware Indians had given their written assent to the

granting of a right of way of an indefinite width across the Delaware Reservation and left it to the United States to determine its width. The Pottawatomies did not do so, in their treaty with the United States. This treaty expressly provided that the right of way was granted "not exceeding 100 feet in width."

Counsel for Defendant in Error contends that the Kindred case conclusively determines that *all* Indian reservations were included within the meaning of the term "Public lands" in the act of July 1, 1862. It will be noted that the grant under the act of 1862 was being construed with the Delaware treaty, then being considered by this Court, and the conclusion reached is in entire harmony therewith. To so include the Pottawatomie Reservation lands would be in direct violation of the express language of the Pottawatomie Treaty. We do not believe that this Court held in the Kindred case, construing the Delaware Treaty, that Congress, by the act of 1862, intended to and did violate the solemn pledge and agreement of the United States with the Pottawatomie Indians. Instead of so holding, this Court did say "that Indian lands as to which Congress *properly* could grant a right of way were intended to be included." (Italics ours.) We do not believe that the Court held, or that Congress intended, that the term "public lands" in the grant of July 1, 1862, included lands which, under the treaty with the Pottawatomie Nation, could not have been honorably granted to the railroad company by the United States.

The Supreme Court of Kansas, in the case of *Grinter v. Kansas Pac. Ry. Co.*, 23 Kan. 642, also cited and relied upon by defendants in error, in construing the Delaware Treaty, based its opinion upon the grounds that the Delaware Treaty, with the assent of the Indians, specifically provided for a right of way across their lands, of an indefinite width. On

page 464 the Supreme Court of Kansas, discussing the question of whether or not the act of 1862, in granting the right of way across the Delaware Reservation, involved a breach of public faith with the Delaware allottees, said:

> "While this question may not absolutely affect the power of congress in the premises, *yet we cannot well assume that there was any intention by the adoption of the act of* 1862 *to violate treaty obligations.*" (Italics ours.)

On page 465 the court further says:

> "The Leavenworth, Pawnee & Western Railroad was incorporated into the system, and the United States assumed the obligation to give it the right of way through the Delaware reservation. This it could do within the exact terms of the treaty of 1860, by paying the Delaware allottees just compensation therefor."

In the Pottawatomie Treaty it was expressly agreed that a right of way was provided "not exceeding 100 feet in width." It will be noticed that in rendering this decision in the Grinter case, the Supreme Court of Kansas based their opinion upon the fact that the Delaware Treaty provided for an indefinite right of way and they expressly state that they could not impute to Congress any intention to violate treaty obligations in the act of 1862. This is the express contention of the plaintiffs in error. The Pottawatomie Treaty permits a right of way not exceeding one hundred feet in width, and to construe this treaty as now contended by defendant in error, would violate this express obligation of the treaty.

If by the act of Congress of July 1, 1862, as amended by the acts of July 2, 1864, Congress intended to grant a right of way more than 100 feet in width across the allotted lands

in question in violation of the terms of the treaty of November 15, 1861, it would show bad faith on the part of the United States with the Indian wards of the government. This should not be imputed to Congress by the Court.

> "A statute granting public lands, or Indian lands which may become public lands, will not be construed as including Indian lands afterwards allotted in severalty under a treaty made immediately before the enactment of the statute, as to do so would be to accuse the government of bad faith with the Indian owners of the land."
>
> *M. K. T. R. R. Co. v. U. S.*, 235 U. S. 40.

> "The legislation which reserved it for any purpose excluded it from disposal as the public lands as the public lands are usually disposed of: and this act discloses no intention to change the long continued practice with respect to tracts set apart for the use of the government or of the Indians. As the transfer of any part of an Indian reservation secured by treaty would also involve a gross breach of the public faith, the presumption is conclusive that Congress never meant to grant it."
>
> *Leavenworth Ry. Co. v. U. S.*, 92 U. S. 742.

The defendant in error also relies upon the case of *Veale v. Maynes*, 23 Kan. 1. In that case the question was whether the United States by treaty with the allottees could provide that the patent for the minor members of an Indian family could be issued to the father instead of to his children. Under the treaty of 1861, the adult male members of the Pottawatomie Tribe of Indians, by complying with the provisions of the treaty, could procure patents in fee simple for their allotments. There was no provision for the minor members of the family to procure patents for the land allotted to them. The Indians were treated as wards of the government

and were not subject to the laws of the state of Kansas, either civil or criminal, until they had complied with the provisions of the treaty of 1861 and became citizens of the United States. That could only be done by the adult members of the tribe. There was no way to sell or convey the allotments given to the children who were under age. Instead of doing as is done in the state courts, under the state statutes, appointing a guardian for the minor, the United States entered into a treaty with the allottees and authorized the head of the family, the father, to receive the patents for land allotted to the minor children and sell their land, thus, in effect, constituting him the guardian or trustee of his family, according to the Indian custom.

In the Veale case a patent was issued to the head of the family and he received the patent to the allotment given to his minor child. When the minor child became of age she brought a suit claiming that the patent was unlawfully issued to her father as the head of the family. The Supreme Court of Kansas in that case, now relied upon by defendant in error, held that the treaty of 1867 was valid. The proceeds of the sale of the land in the Veale case went to the head of the family and thereby inured to the benefit of the original allottee. In the Veale case they had a treaty supporting it with the assent of the Indians and were not trying to ignore the treaty and give part of the land away to a stranger or an outsider, not a member of the family.

In this case the defendant in error asks this Court to wholly ignore the treaty and permit it to take the title to a strip of land 300 feet wide, in violation of the treaty of 1861. Not only to do that, but to wholly ignore the provisions of the act of Congress of July 1, 1862, providing that the title of the Indians had to be extinguished. They ask this Court to sustain them in such an unjust claim and we dare say that no decision can be cited to support such demand.

On page 32 of their brief counsel for defendants in error go outside the record in reciting certain things which they claim defendant in error has done regarding taking possession of the right of way. Admission 31 shows the fact to be that the defendant in error has not anywhere used more than one hundred feet for a right of way, and that the remaining three hundred feet has been in the actual possession of the Indians and their grantees and used continuously by them under a *bona fide* claim of ownership, and they have paid all taxes thereon. If the defendant in error should find that a greater right of way is ever needed, the law provides ample means through eminent domain for obtaining such land. It is not necessary that the private and individual owners of land along the company's track should be compelled to donate additional ground to meet the possible future needs of the defendant in error. No such need ever having arisen in more than fifty years since the road was constructed it is not within reason to presume that such need will ever arise.

The plaintiffs in error have all of the title and rights that the Indian patentees had, under whom they claim. They stand in their shoes, and are entitled to precisely the same protection and enforcement of those rights as would such Indian citizens be if they had never conveyed to plaintiffs in error and were here asserting these rights.

We therefore pray that the judgment of the lower court be reversed, and that this Court direct the lower court to enter judgment in favor of the plaintiffs in error.

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[redacted]

[redacted]

No. 119

JOSEPH S. NEDBAL, MARTHA NEDBAL, HIS WIFE, ET AL., PLAINTIFFS IN ERROR,

vs.

UNION PACIFIC RAILROAD COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF OF DEFENDANT IN ERROR.

[redacted]

[redacted]

[redacted]

Attorneys for Defendant in Error.

(26,551)

SUBJECT INDEX.

AUTHORITIES CITED.

Acts of Congress and Treaties.

In the Supreme Court of the United States

OCTOBER TERM, 1919

No. 119

JOSEPH E. NEDEAU, MARTHA NEDEAU, HIS WIFE, ET AL., PLAINTIFFS IN ERROR,

vs.

UNION PACIFIC RAILROAD COMPANY, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR

STATEMENT OF THE CASE.

The Leavenworth, Pawnee and Western Railroad Company was created by an act dated August 30, 1855, of the Legislature of Kansas Territory, and was authorized by its charter to hold a right of way 100 feet wide and to build a railroad from the city of Leavenworth to Fort Riley, with the privilege of extending the same to the western boundary of the territory, and was required to begin construction within five years. (Laws of Kan. Ter. 1855, p. 915.) (Adm. 4, Trans. 9.) Extracts from that act will be found in the appendix.

The act of Congress of July 1, 1862 (12 Stat. 489), creating the Union Pacific Railroad Company authorized it to build a line of railroad from a point on the 100th meridian in the Territory of Nebraska to the western line of Nevada, granted it a right of way through the public lands 200 feet wide on each side of its railroad, and agreed that the United States would extinguish the Indian title to any land required for such right of way (Sec. 2), and also, to aid it in constructing its railroad, granted it every alternate section of public land, designated by odd numbers to the amount of five alternate sections per mile on each side of its railroad, not sold, reserved or otherwise disposed of by the United States and to which a homestead or preemption claim had not attached at the time the line of road should be definitely fixed. (Sec. 3.)

Section 9 of that act authorized the Leavenworth, Pawnee and Western Railroad Company, the Kansas corporation above mentioned, to build a railroad from the Missouri River at the mouth of the Kansas River on the south side thereof, so as to connect with the Pacific Railroad of Missouri, to a connection with the Union Pacific Railroad on the 100th meridian in Nebraska, upon the same terms and conditions provided in regard to the Union Pacific Railroad Company.

The Leavenworth, Pawnee and Western Railroad Company duly assented to all the terms of that act (Adm. 5, Trans. 9), and on July 4, 1862, only two days after the passage of the act, it filed in the Department of the Interior a map showing the probable route of its railroad from a point opposite the town of Lawrence, west across the Pottawatomie Reservation to the left bank of the Republican River at Fort Riley, thence up the left bank of that river to the 100th meridian where it would connect with the projected line of the Union Pacific as required by the ninth section of the act. That map was accepted by

the department as a compliance with Section 7, and as required by that section, the Secretary of the Interior on July 17, 1862, issued orders to the registers and receivers of the proper land offices in Kansas and Nebraska for the withdrawal of all the public lands within 15 miles on each side of the route shown, from pre-emption, private entry and sale. (Adm. 23*a*, Trans 14.)

The act of July 1, 1862, was amended in some particulars by the acts of July 2, 1864 (13 Stat. 356), and July 4, 1866 (14 Stat. 79), and the Leavenworth, Pawnee and Western Railroad Company duly assented to the terms of those acts. (Adm. 7, Trans. 9.)

The act of 1864 extended the time in which to file maps and construct the railroad, and it further provided that instead of making a connection with the Union Pacific on the 100th meridian in Nebraska, such connection might be made at a point farther west. (Sec. 9.) It also provided that the various railroad companies mentioned in the act of July 1, 1862, were empowered to purchase or condemn a right of way where necessary not exceeding in width 100 feet on each side of the center line of their roads unless a greater width was required for specific purposes. (Sec. 3.)

On July 1, 1865, the Leavenworth, Pawnee and Western Railroad Company filed a second map showing its general route from a point on the state line between Kansas and Missouri at the mouth of the Kansas River to the point on the 100th meridian where it was to connect with the Union Pacific Railroad, and from Lawrence west it followed the same route shown by the map filed July 4, 1862. (Adm. 25, Trans. 15.)

The company built its railroad as far as Fort Riley along the line shown by those maps and across the land involved in this action some time prior to July 7, 1866, and the rail-

road was examined and approved by commissioners appointed by the President, who reported that it had been constructed in accordance with the acts of July 1, 1862, and July 2, 1864, their report was approved by the President, the road was accepted, and bonds were issued to the company at the rate of $16,000 per mile, as provided in those acts. (Adm. 12, 13, 14, Trans. 9 and 10.)

The railroad so constructed, crossed the diminished Delaware Indian Reservation, as well as the Pottawatomie Reservation. The Delaware Indian Reservation was entirely on the north side of the Kansas River, but the Pottawatomie Reservation, 30 miles square, laid on both sides of that river. The lands involved in this case were formerly a part of the Pottawatomie Indian Reservation, and the Union Pacific Railroad Company, the legal successor of the Leavenworth, Pawnee and Western Railroad Company, claims a right of way 200 feet wide on each side of its track through all lands formerly included in that reservation, and it brought this action in the District Court of the United States, District of Kansas, to recover possession of the outer part of the 400 foot right of way so claimed, and the defendants, who were then in possession of the part in controversy, claimed that as the lands had been set apart as an Indian reservation prior to the act of July 1, 1862, they were not public lands within the meaning of that act; and that, therefore, the Leavenworth, Pawnee and Western Railroad Company did not get a 400 foot right of way across them.

The case was tried on an agreed statement of facts (Trans. 8-33) and judgment was rendered in favor of the plaintiff adjudging it to be the owner of and entitled to the possession of the 400 foot right of way claimed in the petition. From that judgment defendants appeal by writ of error.

History of the Pottawatomie Reservation.

In 1846 the Pottawatomie tribe of Indians ceded their reservation in Iowa to the United States for $850,000, and by the treaty they were given a new reservation in Kansas for which the United States deducted $87,000 from the amount paid for the old reservation. (9 Stat. 853.) The Kansas reservation was thirty miles square, contained 576,000 acres and laid on both sides of the Kansas River.

In 1861 a second treaty was made which was ratified by the United States Senate April 15, 1862, and it provided that lands in the reservation should be allotted in severalty to members of the tribe who had adopted the customs of the whites and desired a separate tract assigned to them. (12 Stat. 1191.)

Article 2 provided for a census of the tribe and that the members be classified showing those who desired lands in severalty and those who desired to hold their lands in common, and thereupon there was to be assigned to the individuals so desiring, separate tracts of land.

Article 3 provided that under certain conditions the President might thereafter issue patents to the allottees.

Article 4 provided for those members of the tribe who desired to hold their lands in common.

Article 5 in part is as follows:

> "The Pottawatomies believing that the construction of the Leavenworth, Pawnee and Western Railroad from Leavenworth City to the western boundary of the former reserve of the Delawares is now rendered reasonably certain, and being desirous to have said railroad extended through their reserve, in the direction of Fort Riley, so that the value of the lands retained by them may be enhanced, and the means afforded them of getting the surplus product of their farms to market, it is provided that the Leavenworth, Pawnee and Western

Railroad Company shall have the privilege of buying the remainder of their lands within six months after the tracts herein otherwise disposed of shall have been selected and set apart, provided they purchase the whole of such surplus lands at the rate of $1.25 per acre.

"And if said company make such purchase it shall be subject to the consideration following, to-wit: They shall construct and fully equip a good and sufficient railroad from Leavenworth City to a point half-way between the western boundary of the said former Delaware reserve and the western boundary of the said Pottawatomie reserve (being the first section of said road), within six years from the date of such purchase, and shall construct and fully equip such road from the said last-named point to the western boundary of said Pottawatomie reserve (being the second section of said road), within three years from the date fixed for the completion of said section; and no patent or patents shall issue to said company or its assigns for any of said lands purchased until the first section of said railroad shall have been completed and equipped, and then for not more than half of said lands, and no patent or patents shall issue to said company or its assigns for any of the remaining portion of said lands until said second section of said railroad shall have been completed and equipped as aforesaid; and before any patents shall issue for any part of said lands payment shall be made for the lands to be patented at the rate of $1.25 per acre; and said company shall pay the whole amount of the purchase-money for said lands in gold or silver coin, to the Secretary of the Interior of the United States, in trust for said Pottawatomie Indians, within nine years from the date of such purchase, and shall also in like manner pay to the Secretary of the Interior of the United States, in trust as aforesaid, each and every year, until the whole purchase-money shall have been paid, interest from date of purchase,

at six per cent per annum, on all the purchase money remaining unpaid.

"And the company shall have the perpetual right of way over the lands of the Pottawatomies not sold to it for the construction and operation of said railroad, not exceeding 100 feet in width, and the right to enter on said lands and take and use such gravel, stone, earth, water, and other materials, except timber, as may be necessary for the construction and operation of said road, making compensation for any damages to improvements done in obtaining such material, and for any damages arising from the location or running of said road to improvements made before the road is located. Such damages and compensation, in cases where said company and the persons whose improvements are injured or property taken cannot agree, to be ascertained and adjusted under the direction of the Commissioner of Indian Affairs."

Neither the Leavenworth, Pawnee and Western Railroad Company nor any of its successors bought the surplus land or any part of it as it was given the privilege of doing under Article 5 of the treaty of 1861. The reservation was surveyed after July 1, 1862. The allotments were made after that date and approved December 12, 1864, and the surplus land was then sold to the Atchison, Topeka and Santa Fe Railway Company, a Kansas corporation, at $1.00 per acre under the terms of the treaty of February 27, 1867. (15 Stat. 535.) (Adm. 28, Trans. 17.)

Patents, without any reservation of a right of way, were issued to the allottees to whom the lands involved in this action had been assigned, the earliest patent being dated June 14, 1867. (Adm. 29-30, Trans. 17.)

The defendants below purchased the land at different times, the earliest in June, 1891. (Adm. 30, Trans. 17.)

POINTS.

1.

The lands involved in this action were public lands within the meaning of Pacific Railroad acts of July 1, 1862, and July 2, 1864.

Kindred v. U. P. Rld. Co., 225 U. S. 582.
Grinter v. The Kan. Pac. Ry. Co., 23 Kan. 642.
State v. Horn, 34 Kan. 556.
State v. Horn, 35 Kan. 717.
The U. P. Ry. Co. v. Kindred, 43 Kan. 134.
Veale v. Maynes, 23 Kan. 1.
U. S. v. Chase, 245 U. S. 89.
U. S. v. Rowell, 243 U. S. 464.
L. L. & G. Rld. Co. v. U. S., 92 U. S. 733.

2.

The acts of Congress of July 1, 1862, and July 2, 1864, were intended to and did grant a right of way across the lands involved in this action, they being a part of the Pottawatomie Indian Reservation.

Grinter v. The Kan. Pac. Ry. Co., 23 Kan. 642
The U. P. Ry. Co. v. Kindred, 43 Kan. 134.
Kindred v. U. P. Rld. Co., 225 U. S. 582.

3.

The treaty of 1861 gave the Pottawatomie Indians the usual Indian title and after allotment gave the allottees only the right to individual occupancy of the tract assigned.

Veale v. Maynes, 23 Kan. 1.
Grinter v. The Kan. Pac. Ry. Co., 23 Kan. 642.
Kindred v. U. P. Rld. Co., 225 U. S. 582.
U. S. v. Chase, 245 U. S. 89.

4.

The grant of the right of way was *in praesenti*, and when the railroad was finally located or constructed, the title to the right of way related back to the date of the grant, July 1, 1862.

Railroad Co. v. Baldwin, 103 U. S. 426.
Stuart v. U. P. R. R. Co., 227 U. S. 342.

5.

Congress conclusively determined that a right of way 400 feet wide was necessary for a public work of such importance.

Nor. Pac. Rld. Co. v. Smith, 171 U. S. 260.
Nor Pac. Rld. Co. v. Townsend, 190 U. S. 267.

6.

The construction of the railroad fixed the boundary of the right of way.

Nor. Pac. Rld. Co. v. Smith, 171 U. S. 260
Jamestown R. R. Co. v. Jones, 177 U. S. 125.
Stalker v. O. S. L. R. R. Co., 225 U. S. 142.
Stuart v. U. P. R. R. Co., 227 U. S. 342.
Barlow v. U. S., 240 U. S. 484.

7.

Plaintiffs in error purchased the land adjoining the railroad more than twenty-five years after it was constructed and they cannot claim that they purchased without notice of the claim of the railroad company to own the right of way.

Kindred v. U. P. R. R. Co., 225 U. S. 582.
Nor. Pac. R. R. Co. v. Smith, 171 U. S. 260.
Railroad Co. v. Baldwin, 103 U. S. 426.
Stuart v. U. P. R. R. Co., 227 U. S. 342.
Roberts v. Nor. Pac. Rld. Co., 158 U. S. 1.

8.

Even if the Government should have extinguished the Indian title and paid the Indians for the right of way, grantees of the Indians cannot complain.

Kindred v. U. P. R. R. Co., 225 U. S. 582.
Roberts v. Nor. Pac. Rld. Co., 158 U. S. 1.

9.

The railroad was built under the supervision of and approved and accepted by the Government, and an individual cannot question the proceedings.

Van Dyke v. Arizona Eastern Rld. Co., 248 U. S. 49.
Nor. Pac. Rld. Co. v. Smith, 171 U. S. 260.
Roberts v. Nor. Pac. Rld. Co., 158 U. S. 1.

10.

The right of way was granted by the act of July 1, 1862, as amended by the act of July 2, 1864.

M. K. & T. Ry. Co. v. Kan. Pac. Ry. Co., 97 U. S. 491.
Stuart v. U. P. R. R. Co., 227 U. S. 342.

11.

Having been granted a right of way, the company retains title to it, whether the full width is occupied by it or not.

Stuart v. U. P. R. R. Co., 227 U. S. 342.

12.

By building its road in accordance with the requirement of the act, the grant became final, and not even the Government could deprive the company of its title after it had performed its part.

Sinking Fund Case, 99 U. S. 700.
U. S. v. U. P. Ry. Co., 160 U. S. 1-33.
Roberts v. Nor. Pac. Rld. Co., 158 U. S. 1.

13.

The act of June 24, 1912 (37 Stat. 138), entitled "An Act to Legalize Certain Conveyances Heretofore Made by the Union Pacific Railroad Company," is not retroactive.

U. P. Rld. Co. v. Laramie Stockyards Co., 231 U. S. 190.

U. P. Rld. Co. v. Sides, 231 U. S. 213.
U. P. Rld. Co. v. Snow, 231 U. S. 204.

ARGUMENT.

"THERE IS BUT ONE QUESTION PRESENTED TO THIS COURT FOR ITS DECISION, AND THAT IS, WERE THE LANDS INVOLVED IN THIS ACTION PUBLIC LANDS WITHIN THE MEANING OF THE ACTS OF CONGRESS DATED JULY 1, 1862, AND JULY 2, 1864, GRANTING A RIGHT OF WAY TO THE LEAVENWORTH, PAWNEE AND WESTERN RAILWAY COMPANY AND ITS SUCCESSORS?" Plaintiffs in Error Brief, p. 14.

We agree with counsel that that is the one question presented by the record, and we shall confine our discussion largely to that question, but as counsel, notwithstanding that statement, argue others, we shall notice them briefly as we go along.

As was said in *Stuart v. Union Pacific Railroad Company*, 227 U. S. 342, the Pacific Railroad Acts have been before this court so many times that it seems unnecessary to make further quotations from them. The Stuart decision settled all questions involved in this case except such as grew out of the fact that the right of way involved is across what was an Indian reservation at the time of the grant, July 1, 1862, and when the railroad was built, in 1865 and 1866.

The Leavenworth, Pawnee and Western Railroad Company was given the right by Congress to build a railroad from a connection with the Pacific Railroad of Missouri from the mouth of the Kansas River on the south side thereof, west to Fort Riley and on to a connection with the Union Pacific Railroad on the 100th meridian in Nebraska, Act July 1, 1862, Sec. 9 (12 Stat. 489). The route it chose, and the one approved by the Government, started

at a connection with the Pacific Railroad of Missouri on the south side of the Kansas River, then crossed that river a short distance above its mouth and followed along its north side across the Delaware Reservation, which began almost at the Missouri line, and on across the Pottawatomie Reservation, just west of Topeka.

July 4, 1862, the company filed a map showing its line from Lawrence west across the Pottawatomie Reservation and beyond; and thereupon the land along the route designated was withdrawn from pre-emption, private entry and sale. (Adm. 23*a*, Trans. 14.)

The company filed other maps and built its railroad across the Pottawatomie Reservation and on by way of Denver to a connection with the Union Pacific. The President appointed commissioners to examine the railroad as provided by Section 4, who reported that it had been constructed in accordance with the provisions of the act, and their reports covering that part of the railroad crossing the Pottawatomie Reservation were approved by the President May 8, 1866, and July 7, 1866 (Trans. 9, 21, 25).

Thereupon, the United States issued its bonds at the rate of $16,000 per mile for the road so far constructed, including that part across the Pottawatomie Reservation (Trans. 10), as provided by Section 5, and the road was accepted by the Government as a complete compliance with the act.

Much space is taken by the other side to show that all the details prescribed by the act were not carried out by the company within the time limit because it did not file maps as required, but this court decided in the Stuart case that maps were not necessary at all, and that the company could acquire the right of way by actual construction of the road. The Government being satisfied, certainly no individual can be heard to say that the law

was not complied with. *Roberts v. Nor. Pac. Rld. Co.*, 158 U. S. 1; *Nor. Pac. Rld. Co. v. Smith*, 171 U. S. 260; *Van Dyke v. Arizona Eastern Rld. Co.*, 248 U. S. 49. See, also, Judge Pollock's opinion (Trans. 38).

The act of July 2, 1864 (13 Stat. 356), while an amendment to the act of July 1, 1862, has no particular bearing, because the first act is the one that granted the right of way from the Missouri River to Fort Riley and across the Pottawatomie Reservation. The second act, which is but an amendment of the first, authorized a connection with the Union Pacific west of the 100th meridian, and the first act as so amended granted a 400 foot right of way for the entire line from the Missouri River by way of Denver to the Union Pacific connection at Cheyenne. *Stuart v. U. P. Rld. Co.*, 227 U. S. 342. It is true the grant did not take effect as to that part of the line west of Fort Riley until the amendment of 1864, but the Pottawatomie Reservation is east of Fort Riley and the grant across it dates from the original act.

The act of 1862 made no provision for a right of way except over public land, but that of 1864 provided that the companies named might purchase or condemn a right of way 200 feet wide across private lands. (Sec. 3.)

The Act of July 1, 1862, Granted a Right of Way Across Indian Reservations.

The Delaware Indian Reservation included the land on the north side of the Kansas River extending from a few miles west of the Missouri state line for about thirty miles west, and the treaty under which that reservation was made is identical in terms with the Pottawatomie treaty, except in one particular, hereafter noticed.

The Leavenworth, Pawnee and Western Railroad Company constructed its railroad across the Delaware Reservation, under the act of July 1, 1862, and this court decided, in *Kindred v. Union Pacific Railroad Company*, 225 U. S. 582, that that act granted it a right of way 400 feet wide across that reservation. We quote:

> "Under Section 2 of the act of July 1, 1862 (12 Stat. 489), and other provisions of that act, the predecessor in title of the Union Pacific Railroad Company acquired a right of way 400 feet in width across the land in Kansas, within the Delaware Diminished Indian Reservation, those lands having been assigned in severalty to individual Delawares under the treaty of May 30, 1860 (12 Stat. 1129), providing for such right of way. While the phrase 'public lands' is a term ordinarily used to designate lands subject to sale under general laws, it is sometimes used in a larger sense, and as used in Section 2 of the Act of July 1, 1862, it includes lands within Indian reservations. Congress so intended and such has been the construction placed on the words by the Interior Department."

In that case, as in this, the railroad was constructed across an Indian reservation. The land in that case had been allotted in severalty before the grant of right of way. Patents were issued to the allottees. The defendants held by *mesne* conveyances under the patentees. With that decision before us we are unable to see the justification for the elaborate argument claiming that an Indian reservation was not public land within the meaning of the Pacific Railroad Acts, and in fact we are bewildered when we note that on pages 9 and 16 of their brief counsel for plaintiffs in error cite the Kindred case as an authority their way on that point.

It is unnecessary to review the many cases cited by counsel in which the term "public land" has been discussed. Those cases involved the land itself and not a right of way across it, and apparently counsel lose sight of the difference between the right of way section of the act and the one granting public land to aid in construction of the road. Section 2, granting the right of way, makes an unconditional grant *in præsenti* across all public lands, and Indian reservations were public lands according to the Kindred decision.

Thirty years before that decision the Kansas Supreme Court decided the question the same way, saying:

> "In 1862, Congress had the exclusive right and dominion over the Delaware Reservation in Kansas, and had full power to permit the construction of a railroad over such reservation by the Leavenworth, Pawnee and Western Railroad Company of Kansas, either with or without compensation to be paid by the company.
>
> "Under the provisions of the Act of Congress of July 1, 1862, entitled 'An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to Secure to the Government the Use of the Same for Postal, Military and Other Purposes,' Congress granted to the Leavenworth, Pawnee & Western Railway Company, now the Union Pacific Railway, Kansas division, the right of way through the public lands of the United States for its road, and agreed to extinguish as rapidly as might be the Indian title required for such right of way. This grant included a right of way through the Delaware Reservation in Kansas, and under the grant, the company had the authority, in November, 1863, without paying compensation to the Delaware allottees, to enter upon the reservation for the purpose of locating its line of road and laying out the right of way, and thereafter of constructing and operating its road over and across said land." *Grinter v. The Kan. Pac. Ry. Co.*, 23 Kan. 642.

Ten years later, following that decision, the same court said:

> "Congress, by the second section of the Act of July 1, 1862, granted the right of way for the railroad through the Delaware Diminished Indian Reservation, and agreed to extinguish as rapidly as might be the Indian title required for such right of way. This grant was for four hundred feet—two hundred feet in width on each side of the railroad." *The Union Pacific Ry. Co. v. Kindred*, 43 Kan. 134.

To the same effect are *State v. Horn*, 34 Kan. 556, and same case, 35 Kan. 717.

See, also, Judge Brewer's opinion in *U. P. Ry. Co. v. Shannon*, 168 Fed. 653.

The reasons for making an unconditional grant of a right of way across all land over which Congress had control are shown by the decision of this court in *United States v. Union Pacific Railroad Co.*, 91 U. S. 72. The war of the rebellion was in progress and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions. The enterprise was viewed as a national undertaking for national purposes. There was a vast unpeopled territory lying between the Missouri and the Sacramento Rivers which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. There was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails, and of supplies for the army and the Indians.

Those were the conditions facing Congress, this court said when it passed the original Pacific Railroad Act. By 1864 it developed that there were some obstacles in the way of speedy construction of the road, and the amend-

ment of July 2 of that year was passed which, among other things, gave the Pacific Railroads the right to purchase or condemn a right of way where it was necessary to cross private lands, but there was nothing in that amendment that gave them any right to purchase a right of way from Indians or to condemn across lands held by the United States in trust for the Indians.

Kindred v. U. P. Rld. Co., 168 Fed. 652.

Section 3, granting public land in aid of the construction of the road, did not include any land to which private claims had attached at the date of definite location of the road or which had been reserved by the United States, so it was held, in *Leavenworth, Lawrence and Galveston Rld. Co. v. United States*, 92 U. S. 733, cited by counsel, that the act of March 3, 1863 (12 Stat. 772), to aid in the construction of certain railroads in Kansas did not embrace any of the lands reserved to the Great and Little Osages by the treaty of June 2, 1825 (7 Stat. 240), but counsel overlook the fact that the act did grant a right of way through the Osage reservation and that court said those lands had been reserved by the United States for the use of the Indians.

So in the case of the Delawares, as in this of the Pottawatomies, the land embraced in their reservations had been reserved by the United States for the use of the Indians and it did not pass under Section 3 of the act, but as there was no exception of any kind in Section 2, that section did grant a right of way across both reservations. The Kindred case is conclusive on the point that Congress intended to and did grant a right of way across Indian reservations, but for the purpose of showing that the Pottawatomie reservation is not an exception, we call attention to the case of *Veale v. Maynes*, 23 Kan. 1, and cannot do

better in stating that case than to quote from this court in *United States v. Chase*, 245 U. S. 89, as follows:

> "A like question was presented and considered in *Veale v. Maynes*, 23 Kansas 1, a case arising out of the treaties of 1861 and 1867 with the Pottawatomie Indians. The earlier treaty provided in language similar to that now under consideration for the assignment of portions of the tribal reservation to individual members in severalty and for the issue by the Commissioner of Indian Affairs of certificates for the assigned tracts, 'specifying the names of the individuals to whom they have been assigned, respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs.' Assignments were made and certificates issued under that treaty and thereafter the treaty of 1867 was negotiated. Following its provisions a tract assigned under the earlier treaty to one member was conveyed by a patent in fee to another. This was claimed to be violative of the right conferred by the assignment, but the right under the patent was sustained. Speaking for the Supreme Court of Kansas, and particularly referring to the earlier treaty, Mr. Justice Brewer, then a member of that court, said:
>
> " 'Now what was intended by this division—that the title be thus divided up, or the mere matter of occupancy? Of course either was within the power of the contracting parties. They might provide for a division among the several Indians which should vest an absolute title in each, beyond the power of the tribe or the Government to disturb without the personal consent of the individual; or they might provide for an individualizing of the right of occupancy, giving to each person a sole right of occupancy in a particular tract, a right guaranteed against invasion by any individual, but still within the power of the tribe as a tribe to convey by treaty. In other words, while that remained the tribal home, each individual desiring it should have separate control of certain lands, yet sub-

ject to the ultimate power of the tribe to change their home and to make absolute conveyance of the whole body of lands. The power of the tribe, as a tribe, remained undisturbed over both the allotted lands and those held in common. That this was the intent and effect of the treaty, we are constrained to hold, and this notwithstanding many expressions which, if used in ordinary contracts between individuals, would have marked significance to the contrary.

"'. . . At present it is enough to notice that the allottee remained a member of the tribe, and if the intention had been to enlarge his title from the ordinary Indian title, one of occupancy, to that of a fee-simple, the intention would, it seems, have been expressed in unmistakable terms. If, on the other hand, a difference was to be made in the mere manner in which the various Indians occupied the tribal home, it was enough that difference was made clear, and language used to indicate that should not be carried to some further meaning.'"

In the Chase case this court held that an assignment of a tract of land in severalty to a member of the Omaha tribe gave nothing but a right of occupancy to the tract assigned and adopted the rule applied to the Pottawatomie Indians by Judge Brewer in the Veale case.

In *United States v. Rowell*, 243 U. S. 464, the court discusses the question of title to Indian allotments and decided that even where an allotment had been made to an adopted member of a tribe by act of Congress, such act could be repealed by a later act.

The Difference Between the Two Treaties.

We said the Delaware treaty considered in the Kindred case is identical in terms with the Pottawatomie treaty, except in one particular.

Article 3 of the Delaware treaty gave to the Leavenworth, Pawnee and Western Railroad Company a preferred right to purchase the unassigned lands in the reservation, and declared:

> "It is also agreed that the said railroad company shall have the perpetual right of way over any portion of the lands allotted to the Delawares in severalty, on the payment of a just compensation therefor, in money, to the respective parties whose lands are crossed by the line of railroad." *Kindred v. U. P. Rld. Co.*, 225 U. S. 582.

The Pottawatomie treaty, Article 5, after reciting the desire of the Indians to have a railroad across their lands so as to enhance their value and afford them transportation for their products, gave the Leavenworth, Pawnee and Western Railroad Company the preferred right for six months after the allotments were made to purchase their surplus lands at the rate of $1.25 per acre, upon certain conditions. The railroad company was required to build and fully equip a railroad from Leavenworth City to a point half-way between the western boundary of the Delaware reservation and the western boundary of the Pottawatomie reservation within six years and to extend the road to the western boundary of the reservation within three years thereafter, and was to purchase all the surplus land within six months. The treaty then declared that the company should have the perpetual right of way over the lands not sold as above provided, not exceeding 100 feet in width, but it was to pay for damage done to improvements on the unsold land.

The Delaware treaty provided for a right of way without specifying its width and for payment therefor, while the Pottawatomie treaty offered to sell the surplus land

and give a right of way 100 feet in width in consideration of the railroad company buying all the surplus land, building a railroad from the city of Leavenworth to the west line of the reservation within nine years from date, and paying for damage to improvements. That is the only difference in the terms of the two treaties. The allotments had been made to the Delawares before the grant to the railroad company, but the allotments to the Pottawatomies were after the grant.

The treaties were between the Indians and the United States, and the railroad company was not a party to them. The Leavenworth, Pawnee and Western Railroad Company did not avail itself of the privilege of buying the Pottawatomie lands. It did not build the railroad from Leavenworth to the west line of the reservation within nine years from April 15, 1862, the date the treaty was ratified. It did not pay the Indians any damages. It had no dealings with the Indians. On the contrary, the surplus lands were sold to the Atchison, Topeka and Santa Fe Railway Company for $1.00 an acre under the terms of a new treaty between the Pottawatomies and the United States dated February 27, 1867 (15 Stat. 535), long after the railroad was completed. (Trans. 17.)

The railroad company in two days after the passage of the act of July 1, 1862, filed a map as provided by that act, showing its general route, and followed up by building from Kansas City across the Delaware and Pottawatomie reservations to Fort Riley and on to a connection with the Union Pacific, as required by the act. The road across the Pottawatomie reservation was constructed under the supervision of the United States. Its commissioners inspected and approved the road and the President accepted it as a compliance with the act, and the bonds provided by the act were issued to it.

The Indians made no objection to the construction or claims for damages and the United States made none on their behalf.

In *Grinter v. The Kan. Pac. Ry. Co.*, 23 Kan. 642, the court said:

> "In 1862 Congress had the exclusive right and dominion over the Delaware reservation in Kansas and had full power to permit the construction of a railroad over such reservation by the Leavenworth, Pawnee and Western Railroad Company, of Kansas, either *with or without compensation* to be paid by the company.

It will be remembered that Article 3 of the Delaware treaty provided:

> "That the railroad company shall have the perpetual right of way over any portion of the lands allotted to the Delawares in severalty, *on the payment of a just compensation therefor, in money, to the respective parties whose lands are crossed by the line of railroad.*"

In the Kindred case this court said:

> "The railroad was located and constructed across these lands without payment of any compensation for the right of way." (p. 594.)

In the Veale case (23 Kan. 1) the court upheld a patent to an Indian other than the allottee to a part of the Pottawatomie reservation, and this court approved that decision in *U. S. v. Chase*, 245 U. S. 89.

Therefore, Congress had the right to grant a right of way across both reservations without making compensation, and it did so, as the act has no provision for compensation. It has been finally decided that a 400 foot right of

way was granted across the Delaware reservation, and the similarity of the two treaties requires a like decision regarding the Pottawatomie reservation. By the act of July 1, 1862, Congress conclusively determined that a right of way 400 feet wide was necessary. (*Nor. Pac. R. R. Co. v. Smith*, 171 U. S. 260; *Nor. Pac. R. R. Co. v. Townsend*, 190 U. S. 267.) A right of way of that width was granted the Leavenworth, Pawnee and Western Railroad Company through the public lands. (*Stuart v. U. P. R. R. Co.*, 227 U. S. 342.) The Pottawatomie reservation was public land (*Kindred v. U. P. R. R. Co.*, 225 U. S. 582; *Grinter v. The Kan. Pac. Ry. Co.*, 23 Kan. 642; *Veale v. Maynes*, 23 Kan. 1.)

The charter of the Leavenworth, Pawnee and Western Railroad Company granted in 1855 authorized it to hold a right of way 100 feet in width, and when the Delaware and Pottawatomie treaties were made, the first in 1860 and the second in 1861, it is probable that provision was in mind, but the Delaware treaty did not designate the width of the right of way, while that with the Pottawatomies did and fixed it at the width named in the charter. If Congress had not passed the act of July 1, 1862, thereby adopting the Kansas Territorial Corporation, and if that corporation had availed itself of the option to purchase the surplus land and had built a railroad from Leavenworth City to the west line of the Pottawatomie Reservation and had paid the Indians for damage to the improvements on their allotments, it could never have claimed more than 100 feet right of way as offered in the treaty. But the company did none of those things. It did nothing until the act of July 1, 1862 was passed, which made it a constituent part of the Federal system of railroads and required it to build, not from Leavenworth, but from Kansas City, at the mouth of the Kansas River, from a connection with the Pacific Railroad of Missouri to a

connection with the Union Pacific in Nebraska, thereby becoming a part of a through line from the Mississippi River to the Pacific Ocean.

In 1861 the Pottawatomies gave the company an option to purchase their surplus land at $1.25 per acre on condition that it would take all the surplus lands at that price and build a railroad from Leavenworth across the reservation, and if it accepted that proposition it was to have a right of way 100 feet wide over the lands not purchased but was to pay for damage to improvements on allotted land. At that time the railroad company was not authorized to hold a right of way of a greater width than 100 feet. But later, Congress determined that 400 feet was the proper width for a public work of such importance (*Nor. Pac. Rld. Co. v. Smith*, 171 U. S. 260; *Nor. Pac. Rld. Co. v. Townsend*, 190 U. S. 267) and gave the company a right of way of that width over a different route from the one described in the treaty and the charter, and specifically agree to extinguish the Indian title when the right of way crossed Indian lands. Congress also offered a land subsidy and $16,000 per mile to aid in construction. The company then had two propositions and it accepted that of Congress as the better one.

With both treaties in existence, each showing that the Delawares and Pottawatomies desired a railroad so as to enhance the value of their land, Congress decided that the good of the country—the safety of the Government—demanded a railroad extending from the Missouri River to the Pacific Ocean, crossing both reservations. It concluded that such a railroad needed a right of way 400 feet wide and it followed its own judgment in that particular. There was no bad faith in that. The Indians had offered a right of way, but Congress differed with them as to the width required. The Indians allowed the judgment of Congress on that point to control. They made no objections to the building of the

road at the time, and they are yet silent. The railroad company took 400 feet of the land, utilized that part needed for track and station grounds and allowed the adjoining landowners to use the outer part until the act of 1912 made it necessary to take possession of all of it.

When Kansas passed a law in 1874 requiring railroads to be fenced, the company constructed a fence on each side of its track fifty feet from the center thereof through the Pottawatomie Reservation, except at stations, which was its standard for fence along its entire line in Kansas. (Trans. 17.) That fence was to keep stock off the track and not to mark the boundary of the right of way and it was placed at the same distance from the track clear across the state.

The width of the right of way was not a very serious matter to the Indians, and as land values then were, it was not much of a financial question. In 1846 the Government bought the rights of the Pottawatomie Indians in the various reservations occupied by them, for which it paid $850,000. It then granted them the Kansas reservation, containing 576,000 acres, and deducted $87,000 therefor from the amount it was to pay for the old reservations. That was fifteen cents an acre for the new reservation. In 1861 the Indians thought their land would be worth $1.25 per acre if they could get a railroad from Leavenworth across the reservation and they offered to sell at that price. The reservation was thirty miles square. The grant gave 48 acres to the mile as a right of way, a total of 1440 acres for the line clear across the reservation, which, at $1.25 per acre, amounted to $1800; or, to state it another way, at the rate of thirty dollars across each quarter-section.

After the railroad company occupied its right of way, thrifty white men took the balance of the land and they are the parties who are trying to enlarge their holdings. The Indians are not interested in the event of this case, and

under the Kindred decision the white men who bought their land long after the railroad was constructed have no legal interest in the land included in the right of way.

It is true the Government has not taken any steps to extinguish the Indian title to the right of way, and it may be the Government thinks there was no Indian title to be extinguished, or perhaps it has been overlooked by enterprising claim attorneys, and so has not been called to the attention of Congress. The Kansas Supreme Court decided forty years ago in the Grinter case that Congress had full power to grant a right of way across an Indian reservation, either with or without compensation to the Indians and even before that it had decided in the Veale case that full title to the land in the Pottawatomie Reservation was in the United States.

The Delaware treaty did provide for payment of just compensation for the right of way to the Indians whose lands were crossed by the railroad but no payment was made at the time the road was built and nothing was then done by the Government towards extinguishing the Indian title. But in 1892 Congress made an appropriation of about $40,000 (27 Stat. 120-126) to pay for damages to improvements and for right of way and then brought suit against the successor in interest of the Leavenworth, Pawnee and Western Railroad Company to recover the amount paid. The Circut Court sustained a demurrer to the bill, and that judgment was affirmed by the Circuit Court of Appeals, *United States v. The U. P. Ry. Co.*, 102 Fed. 1007, after this court had refused to pass on certain questions certified to it. (168 U. S. 505.) That case settles the point that the railroad company did not have to pay for the right of way through that reservation, and that Congress had granted the right of way free and clear of any claims the Indians might assert and

had agreed by the act to protect the company from any such claims by extinguishing the Indian title.

So in this case if the Pottawatomies had any claims they were against the Government and not against the company. But as in the Kindred case, we are not concerned with that question because the right to have the compensation seasonably ascertained and paid by whomsoever was liable therefor was not insisted upon, but, on the contrary, the construction of the railroad was allowed to proceed, and the road was completed and put into operation as a public highway without any objection.

The Railroad Company Took Under the Grant and not Under the Treaty.

We have already discussed that point to some extent and will try not to repeat.

The Leavenworth, Pawnee and Western Railroad Company, originally a Kansas Territorial corporation, changed its name on June 6, 1863, to the Union Pacific Railway Company, Eastern Division, and on April 5, 1869, the name of the company was changed to the Kansas Pacific Railway Company.

In 1880 the Kansas Pacific Railway Company, the Denver Pacific Railway and Telegraph Company and the Union Pacific Railroad Company (the last being the corporation created by the act of July 1, 1862) were consolidated into The Union Pacific Railway Company and the consolidated company was a Federal corporation with right of removal of causes to the Federal court, Pacific Removal Cases, 115 U. S. 1, and before that time it had been decided that the Kansas Pacific Railway Company had the right to remove. *The Kan. Pac. Ry. Co. v. Kansas*, 111 U. S. 449.

The first section of the act of July 1, 1862, named a number of individuals and organized them into a railroad corporation. The ninth section named a Kansas Territorial corporation and endowed it with all the rights and privileges given the individuals named in the first section.

The act then provided that railroads should be built from four points on the Missouri River, viz., the mouth of the Kansas River (Kansas City), Saint Joseph, a point on the western boundary of Iowa (afterwards fixed at Council Bluffs) and Sioux City and all should run to a connection with the eastern terminus of the Union Pacific on the 100th meridian in Nebraska. All these roads were to be of a uniform gauge and were to be operated as one continuous, connected line (Section 12) and when constructed to a connection with the Central Pacific Railroad made a continuous line from the Missouri River to the Pacific Ocean.

The Leavenworth, Pawnee and Western Railroad Company got all the powers, rights and privileges, exercised and enjoyed by it after July 1, 1862, from the act of that date and in the exercise of those powers built its railroad so as to form an important link in the through line from the Missouri River to the Pacific Ocean. The company lost its identity as a Territorial corporation and became to all intents and purposes as much a Federal corporation as the Union Pacific Railroad Company named in the first section of the act.

From that time on the United States took charge and directed all movements. The act of July 1, 1862, directed it to build from Kansas City, which was a different starting point from the one named in its charter to a connection with the Union Pacific in Nebraska and indeed clear on to a connection with the Central Pacific if the Union Pacific did not build its line. The charter did, and at the most only could, grant it powers within the limits of the Territory. The act

of Congress authorized it to consolidate with all the other Pacific railroads so as to make a consolidated Federal corporation, and the only procedure required was that notice of such consolidation should be filed in the Department of the Interior. (Sec. 16.)

The act of July 2, 1864, recognized and approved the change of name to Union Pacific Railroad Company, Eastern Division (Sec. 12), and the act of March 3, 1869 (15 Stat. 348), authorized the change of name to the Kansas Pacific Railway Company.

The State of Kansas recognized the Federal character of the road and the authority of the Government over the corporation. For example, on March 18, 1864, the State Legislature passed a concurrent resolution asking Congress to require the Leavenworth, Pawnee and Western Railroad Company to make Wyandotte (at the mouth of the Kansas River), Lawrence, Topeka, Wabaunsee, Manhattan and Junction City, points on its road, thereby approving the route prescribed by act of July 1, 1862.

Again, on February 9, 1867, the Legislature passed a second resolution petitioning Congress to grant the company further aid to enable it to speedily complete its road to a junction with the Union Pacific line from Omaha.

And again, on February 27, 1868, another resolution was passed asking Congress to extend additional aid to enable the road to be extended west of the point to which it was entitled to subsidies under existing law.

February 3, 1874, still another concurrent resolution was passed reciting that "By act of Congress passed July 1st, 1862, providing for the construction of a main line of railroad and telegraph from the 100th meridian of west longitude to the Pacific Ocean, with branches to connect therewith from St. Joseph, Wyandotte and Sioux City, and by the several acts amendatory thereto passed July 2nd, 1864, July

3rd, 1866, and March 3rd, 1869, it is expressly stipulated and provided that the said main line of road together with the several branches shall be required to operate and use the said roads and telegraph for all purposes of communication, travel and transportation as far as the public and government are concerned, as one continuous line," etc., and then charged that the Kansas line was being discriminated against by the main line in Nebraska. Responding to that resolution, Congress passed the act of June 20, 1874 (18 Stat. 111), which required the Pacific Railroads to be operated as a continuous line and prescribed penalties for failure to comply.

The resolutions referred to are found in Dillon Pacific Railroad Laws, 191-195.

The Territorial charter (Sec. 11) required the company to begin construction of its road within five years of date, August 30, 1855, but nothing was done by it until after the passage of the act of July 1, 1862, seven years after the date of its charter, and if Congress had not acted the railroad would not have been constructed; so, we repeat that every move made by the company after July 1, 1862, was in accordance with the terms of the act of that date and under the direct supervision of the United States, and that at no time did the company accept any of the benefits of the treaty or deal with the Indians in any way. To follow the route prescribed by the act it was necessary to cross the Pottawattomie Reservation and Congress independently of the treaty which the Government had made with the Indians, granted a right of way 400 feet wide across all public lands from the Missouri River to the Pacific Ocean. The railroad was built for the entire distance. The right of way was reduced to possession by the building of the road. For station grounds, at places, the entire width was utilized from the beginning. At other places, all the right of way was not needed immediately, but as business increased with the

growing settlement of the country or conditions changed in other respects, more and more of the right of way was required. The railroad was double-tracked from Kansas City to Topeka, and to do that work it was necessary to get close to the outside boundary of the 400-foot right of way in places and in fact at certain points, in order to reduce curves and grades, the new tracks were built entirely outside of the original right of way. When that work was done and since, long passing tracks were constructed so that in places there is a four-track railroad. Objections were made by the adjoining land-owners and force was used by them to prevent the company from changing its tracks and it took the decision in the Kindred case (225 U. S. 582) to get the right to make the improvements public necessities required. In a recent case the Kansas Supreme Court said:

> "No court can say as to any particular strip or part of the right of way, that the time will never come when the whole 400 feet at a given point on the railroad will be needed for some proper purpose in connection with the operation of the railroad."
>
> *Union Pacific Rld. Co. v. Davenport*, 102 Kan. 513.

The Act of July 1, 1862 Did Not Restrict the Railroad to One Side of the River.

While it has no bearing on the case, we notice the claim that the act of July 1, 1862, required the company to build on the south side of the river.

History tells us that when the Pacific Railroads were created the Pacific Railroad of Missouri (now the Missouri Pacific) was being built from St. Louis to Kansas City, Missouri, and section 9 of the act of July 1, 1862, required the Leavenworth, Pawnee and Western Railroad Company to build from a connection with that road to be made on the

south side of the Kansas River. The Kansas River is entirely in Kansas, and Kansas City, Missouri, is on the south side of the river. From the designated starting point the road was required to cross the river at some point so as to reach Fort Riley and the point of connection with the Union Pacific in Nebraska. After starting at the mouth of the Kansas River on the south side thereof the route was not prescribed except that a connection should be made with the Union Pacific in Nebraska. The company started at the designated point and crossed the river a short distance from its mouth and that route was approved by the Government. It is true, the act of July 2, 1864, required that "Said railroad from the mouth of Kansas River to the 100th meridian of longitude, shall be made by the way of Lawrence and Topeka or on the bank of the Kansas River opposite said towns." That is the first language that said anything about the road being built on that side of the river except at the starting point.

The concurrent resolution passed by the Kansas State Senate, March 18, 1864, explains why the act of July 2, 1864, contained the provision quoted. That resolution in part reads:

> "Whereas, said company so represented has surveyed and located said road to a point three miles north of Lawrence, the largest city in the Kansas Valley, and are surveying said road north of Topeka, the capital of Kansas, and are thus avoiding our cities, towns and business," etc.
>
> "Resolved, 1st, By the House of Representatives, the Senate concurring therein, That Congress be earnestly requested to amend the act above referred to, so as to require the Leavenworth, Pawnee and Western Railroad Company, or their assigns, to make Wyandotte, Lawrence, Topeka, Wabaunsee, Manhattan and Junction City points on said road."
>
> Dillon Pacific Railroad Laws, 191.

Acting on that resolution, Congress, by the act of July 2, 1864, directed the company to build by way of Lawrence and Topeka or on the north bank of the river opposite those towns. Prior to then the company had located its line on the north side of the river and three miles from it under the authority of the act of July 1, 1862, and no question was raised as to its right to do so, and all Congress did by the second act was to require it to move its line three miles south to the north bank of the Kansas River where it passed Lawrence and Topeka.

Up to now no route has been found for a railroad from Kansas City to Fort Riley except along the Kansas River and to follow that route no matter which side of the river was taken it was necessary to cross the Pottawatomie Reservation.

Counsel, in claiming that the company had no rights on the north side of the river until the act of July 2, 1864, seem to think some vested interests accrued under the allotments before that act took effect, but the allotments were not made until they were approved by J. P. Usher, Secretary of the Interior, on December 12, 1864. In the case of the Delawares the allotments had been made before the original act of July 1, 1862, was passed, and it was decided in the Kindred case that the act granted a 400-foot right of way across such allotments.

CONCLUSION.

Counsel say:

> "The United States not having taken any steps to extinguish the Indian title to more than that given by the treaty, the grantees of the Indian owners had a right to assume that the railroad company would have to condemn and pay for any additional right of way needed as provided for in the act of July 2, 1864." (Brief, p. 48.)

But the Circuit Court of Appeals said:

> "There were no provisions in the act of 1862 conferring upon the railroad company the power of eminent domain, and those of the later act of July 2, 1864, were intended to apply not to lands like those of the individual Delawares, but to those held by persons whose rights and titles were ordinarily judicable in proceedings in courts of justice."
>
> *Kindred v. U. P. R. R. Co.*, 168 Fed. 652.

Counsel recognize the rule there announced, for later on in their brief they say:

> "The railroad company had no right to take steps to extinguish the title without the consent of the United States. Such rights could not be interfered with nor put in contest by private parties." (P.51.)

Counsel, in arguing that Congress did not intend to grant a right of way across Indian land (brief, p. 18) lay stress upon that provision of the act promising that the United States would extinguish the Indian titles. But the Circuit Court of Appeals in the Kindred case said:

> "The grant of a right of way in section 2 applied to all public lands in respect of which Congress could so legislate. That the term 'public lands' included those in the Delaware reservation is shown we think by the final clause of section 2 wherein the United States assumed the duty of extinguishing the Indian title."

Judge Pollock tried the Kindred case in the District Court, and he also tried this one. In the opinion in this case (Trans. 34), among other things, he said:

> "While there is some controversy here attempted to be raised as to the strict compliance by the Leavenworth, Pawnee and Western Railroad Company with all

the requirements of the government as expressed in the act of 1862, and as thereafter amended, as it was accepted by the railroad company, yet these are matters of which, in my judgment, the government alone can complain. The road was constructed by the railroad company and was accepted by the government as in full compliance of the act under which it was built, and without opposition from the Pottawatomie tribe of Indians or any member of the tribe as an allottee of portions of that reservation. That by the act of July 1, 1862, the government solemnly determined and declared a right of way four hundred feet in width was necessary as a right of way for the road it desired constructed and was caused to be built under the terms of the act cannot be disputed.

. . . . . .

"While it is true under the provisions of the act of July 1, 1862, the government obligated itself to proceed to the extinguishment of the Indian titles in lands granted as right of way to the railroad company which accepted the provisions of the act and constructed the road, and that the government did not so proceed, and said provision of the act has not been complied with, yet this must be held to be a matter between the Indian allottees in severalty of the tribe and the government.

. . . . . .

"While as appears from the treaty between the government and the Pottawatomie Indians establishing the reservation and providing for its allotment to the members of the tribe in severalty, it was at the time contemplated by both parties thereto the Leavenworth and Pawnee Railroad Company would construct a line of road from the city of Leavenworth in this state to the west line of said reservation, and while for this purpose the road was to have a right of way across said reservation, one hundred feet in width, and in consideration of the building of said line said company was to have the right to buy all the surplus lands of said tribe, for the sum of one dollar and twenty-five cents per

acre, yet this provision of the treaty was neither accepted nor acted upon by the Leavenworth, Pawnee and Western Railroad Company. The road was not built and the road contemplated in this provision of the treaty was not to form a part of the governmental highway from the Missouri River to the Pacific coast, and therefore said provision of the treaty was in no manner or way binding upon the Leavenworth, Pawnee and Western Railroad Company or its successors in title and right.

. . . . . .

"It follows, as the grant to the railroad company of its rights of way over and across the Pottawatomie Indian reservation made in pursuance of the act of July 1, 1862, was a present grant in fee of a right of way four hundred feet in width to that company which should accept the terms and provisions of the act and construct the road; as Congress possessed the power to make such grant in such form to the Leavenworth, Pawnee and Western Railroad Company notwithstanding its prior treaties with the Pottawatomie tribe of Indians, and as defendants deraign their title from the Indian allottees or the purchasers of the surplus lands of said reservation after allotment made, and as the defendants derived their title from conveyances made more than a quarter of a century after the road desired by the government to be built was constructed and in operation over and across said lands under the law of July 1, 1862, it follows, the prayer of the plaintiff must be granted."

The Kansas Supreme Court decided in the Veale case that land in the Pottawatomie Reservation which had been assigned in severalty to one Indian could be patented to another; therefore, that the assignee had only a several right of occupancy with full title to and power of disposal in the United States.

The same court, in the Grinter case, said the United States had full power through the act of Congress to grant a right of way, either with or without compensation, across the Delaware Reservation.

Judge Brewer, at Circuit, said the same thing in the Shannon case. Judge Pollock followed those decisions in the Kindred case and the United States Circuit Court of Appeals affirmed him and when that case reached this court, it settled the question as we thought forever.

Judge Pollock, following those decisions, has now decided that the land in the Pottawatomie Reservation was "public land" within the meaning of the Pacific Railroad laws, and as counsel for the other side say, that is the only question presented, the judgment should be affirmed.

While the act of June 24, 1912 (37 Stat. 138), entitled "An act to legalize certain conveyances heretofore made by the Union Pacific Railroad Company," is not involved in this case, we call attention to it because it purports to make the limitation laws of the state apply to possession of any part of the right of way hereafter, so that it became necessary for the company to go into actual possession or run the risk of having claims of adverse possession made against it.

Respectfully submitted.

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Attorneys for Defendant in Error.

APPENDIX.

LAWS OF KANSAS TERRITORY, 1855,, p. 914.

An Act to incorporate the Leavenworth, Pawnee and Western Railroad Company.

Section 1. A company is hereby incorporated, called the Leavenworth, Pawnee and Western Railroad Company, the capital stock of which shall be five millions of dollars, to be divided into shares of fifty dollars each; the holders of which, their successors and assigns, shall constitute a body corporate and politic, and by the name aforesaid shall have continual succession, may sue and be sued, plead and be impleaded, defend and be defended against, and may make and use a common seal and change and alter the same at pleasure, and shall be able in law and equity to make contracts; may take, hold, use, possess and enjoy the fee simple or other title in and to any real estate, necessary to carry out the provisions of this act and no more, and may sell, convey, pledge, mortgage or dispose of the same; may make by-laws, rules and regulations proper and necessary for carrying into effect the provisions of this act, not repugnant to the constitution or laws of the United States or of this territory, and shall have the usual and necessary powers of companies for such purposes.

Sec. 2. W. H. Russell, J. Marion Alexander, S. D. LeCompte, Amos Rees, James Davies, W. F. Dyer, Robert Wilson, James Findlay, E. S. Wilhoit, Edward H. Dennis, C. H. Grover, Wilburn Christison, M. P. Rively, Charles Hayes, and Cornelius M. Burgess, or any five of them, shall constitute the first board of directors under this act, and shall, hold their office until their successors shall be qualified; they shall, within five years from the date of the passage of this act, meet at such time and place as shall be designated by any three of them, and organize as a board of directors; and when organized, they shall cause books to be opened for subscription to the capital stock of the said company, at such time and place as they may designate, under the supervision

of such persons as they may appoint, and may continue them open so long as they may deem proper, and may reopen such books when necessary until the whole stock shall be subscribed.

Sec. 7. Said company shall have full power to survey, work, locate and construct a railroad from the west bank of the Missouri River, in the town of Leavenworth, in this territory; and from thence west to the town of Pawnee, or to some point feasible and near to the government reservation for Fort Riley, with the privilege of extending the same to the western boundary of the territory, and for that purpose may hold a strip of land, not exceeding one hundred feet in width, with as many set of tracks as the said president and directors may deem necessary; Provided, That in passing hills or valleys the said company are authorized to extend said width in order to effect said object, and may also hold sufficient land for the erection of depots, warehouses and water stations, and may extend branch railroads to any point in any of the counties through which the said road may be located; and said company shall have power to construct a branch road from any point in the main trunk of said road to the town of Kickapoo, on the Missouri river; no discrimination shall be made between the main trunk of said railroad and the branches connecting with the same, in regard to the rates of passage and the charges for freight shipped over the same.

Sec. 11. Said company shall commence the construction of said road within five years, and shall complete the same within twelve years thereafter; and said company shall have general power to use, manage, control, and enjoy said road; shall determine what kind of carriages shall be used thereon, and by whom and in what manner; and shall determine the terms, condition and manner in which merchandise, property and passengers shall be transported; and shall have power to construct and keep such turnouts, gates, culverts, toll-houses, depots, warehouses, causeways, and other buildings, machinery and fixtures, as may be necessary. Said company may receive such tolls and freights as may be determined upon by the directors, and shall keep posted up in their depots estimates of the rates of tolls and freight charged.